Supreme Court U.S.
FILED

No. 06-1232 MAR 6 - 2007

OFFICE OF THE CLERK

In The Supreme Court of the United States

CSX TRANSPORTATION, INC. and RONALD PAUL BOWEN,

Petitioners,

v.

EARTHA MAE WILLIAMS, as Personal Representative of the Estate of Gregory Stanley Williams,

Respondent.

On Petition for Writ of Certiorari from the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

E. Duncan Getchell, Jr.
Counsel of Record
Robert L. Hodges
J. Tracy Walker, IV
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-4319 (telephone)
(804) 698-2061 (facsimile)

Phillip E. Reeves
Ronald K. Wray, II
GALLIVAN, WHITE & BOYD
55 Beattie Place
Suite 1200
Post Office Box 10589
Greenville, SC 29603
(864) 271-5362 (telephone)
(864) 271-7502 (facsimile)

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

This case arises from a fatal railroad crossing accident in Swansea, South Carolina. The case went to the jury on punitive damages against CSX Transportation, Inc. ("CSXT") over CSXT's timely objection that Plaintiff had been permitted to present a case for punitive damages premised in part upon conduct toward non-parties dissimilar to that which caused harm to Plaintiff in violation of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). CSXT also objected to a lack of procedures to protect its due process rights including the failure to bifurcate, the failure to use a special verdict form and the failure to instruct on the due process limitations on punitive damages. The jury returned a verdict for $4.5 million in compensatory damages and $7.5 million in punitive damages which was remitted to $4.5 million.

On timely appeal, the Supreme Court of South Carolina held that the trial court committed instructional error with regard to negligence *per se*. Nonetheless the court affirmed the liability verdict under South Carolina's "two issue rule" -- a judicially crafted doctrine that allows affirmance of a general verdict notwithstanding error affecting one claim when there is an independent ground to sustain the jury's verdict. However, the court vacated the judgment for punitive damages based upon instructional error and remanded for a new trial limited to punitive damages only. This case presents questions concerning the application of the Due Process Clause of the Fourteenth Amendment as applied in this Court's decisions in *Campbell* and in *Phillip Morris, USA. v. Williams*, No. 05-1256, decided February 20, 2007:

Did the trial court deprive defendant CSXT of due process at trial by permitting the jury to punish CSXT for harm to non-parties and did the Supreme Court of South

Carolina perpetuate that denial of due process in its ruling below?

There are four subsidiary questions:

1. As in *Phillip Morris*, did South Carolina fail to guard against jury confusion concerning the due process limitations on punitive damages?

2. Where the jury verdict has been sustained under the "two issue rule" and there are multiple theories on which liability might have been premised, may the Supreme Court of South Carolina remand the case for a new trial on punitive damages only without violating due process limitations under *Campbell* and *Phillip Morris*, inasmuch as the second jury cannot know what conduct the first jury relied upon to find primary liability?

3. Is a general verdict form incompatible with procedural due process rights when a punitive damages award may be based on non-causal conduct and a constitutionally mandated *de novo* review is rendered impossible because the conduct giving rise to liability is unknown and unknowable?

4. May the Supreme Court of South Carolina remand the case for a new trial on punitive damages following a decision upholding admission of evidence of conduct that is dissimilar to the conduct giving rise to liability without violating due process limitations established by *Campbell* and *Phillip Morris*?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Plaintiff Eartha Mae Williams as Personal Representative of the Estate of Gregory Stanley Williams and Defendants CSXT and Ronald Paul Bowen. Ronald Paul Bowen was the operator of the railroad vehicle involved in the accident and an employee of CSXT. Plaintiff voluntarily dismissed Ronald Paul Bowen before trial.

CORPORATE DISCLOSURE STATEMENT

CSXT is a wholly-owned subsidiary of CSX Corporation, a publicly traded corporation listed on the New York Stock Exchange. No other publicly traded corporation owns 10% or more of CSXT's stock.

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The opinion of the Supreme Court of South Carolina is unreported but is reproduced in Petitioner's Appendix at 1a through 12a. The order of the Supreme Court of South Carolina denying rehearing is unreported but is reproduced in Petitioner's Appendix at 22a through 25a.

JURISDICTIONAL STATEMENT

This petition seeks review of the final judgment after appeal to the Supreme Court of South Carolina. The judgment of the court was issued on January 2, 2007. CSXT timely petitioned for rehearing and the petition for rehearing was denied on January 31, 2007. This Court has jurisdiction to review the final decision of the Supreme Court of South Carolina pursuant to 28 U.S.C. § 1257(a).

This case involves application of the Due Process Clause of the Fourteenth Amendment as construed in this Court's decision in *Campbell*, 538 U.S. 408 (2003). This case presents a similar issue to *Philip Morris*, No. 05-1256, decided February 20, 2007.

RELEVANT CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

> due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. XIV, § 1.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The decision from which review is sought arose from a jury trial in the Court of Common Pleas of Orangeburg County, South Carolina. At trial the court refused to bifurcate liability and punitive damages, refused to employ a special verdict form and refused to instruct the jury on due process limitations on punitive damages. The jury was also misinstructed, over CSXT's objection, on a negligence *per se* theory of liability and on the meaning of the term "clear and convincing" evidence.

Over CSXT's objections, the trial court admitted evidence of out-of-state conduct and dissimilar acts, including accidents involving non-parties. The evidence was similar to, and in some cases, the identical evidence, that the Supreme Court of South Carolina had found constitutionally infirm in *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005) (applying *Campbell*).

The jury returned a verdict of $4.5 million in compensatory damages and $7.5 million in punitive damages. Punitive damages were remitted to $4.5 million.

CSXT timely appealed to the South Carolina Court of Appeals, and the case was subsequently transferred to the Supreme Court of South Carolina. CSXT's appeal was based on, among other issues not relevant here, the trial court's refusal of proper instructions on limitations on conduct which can be used to support punitive damages, on

the trial court's admission of evidence of dissimilar acts, on the misinstruction on negligence *per se*, on the trial court's denial of CSXT's request for bifurcation of punitive damages and request for use of a special verdict form, and on misinstruction on the meaning of the term "clear and convincing" evidence.

On appeal, the Supreme Court of South Carolina agreed that the jury was misinstructed on negligence *per se* and on the meaning of "clear and convincing" evidence. However, the court held that the error concerning negligence *per se* was harmless because under South Carolina's "two-issue rule," there was evidence supporting multiple other theories of recovery sufficient to sustain the verdict. The court also held that the trial court properly exercised its discretion in refusing CSXT's requests for bifurcation and for a special verdict form. Admission of evidence of causally dissimilar acts affecting only non-parties was affirmed. The court then reversed and remanded the case for retrial on punitive damages only.

CSXT petitioned for rehearing on the grounds that, under the circumstances of this case, retrial on punitive damages alone violated CSXT's due process rights as recognized in *Campbell*, and by the Supreme Court of South Carolina's decisions following *Campbell* in *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 604 S.E.2d 385 (2004), and *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 750 (2004). CSXT further complained that the combination of the two-issue rule and the lack of a special verdict form prevented the Supreme Court of South Carolina from conducting the constitutionally-required *de novo* review of punitive damages, *Campbell*, 538 U.S. at 418, because it did not know what conduct was relevant to that assessment.

Because neither the Supreme Court of South Carolina nor the trial court nor the jury on remand could know

whether and to what extent liability was premised on several competing theories, no trial limited to punitive damages could satisfy the due process standards of *Campbell* because it would be impossible to confine punitive damages to conduct that was similar to conduct giving rise to liability.

CSXT also petitioned for rehearing on the ground that the trial court admitted and the jury considered impermissible evidence of dissimilar and out-of-state acts, evidence which was in some instances the identical evidence that the court had held constitutionally required reversal under *Campbell* in its earlier decision of *Webb*, 364 S.C. at 657, 615 S.E.2d at 450. Having affirmed the admission of such evidence, the Supreme Court of South Carolina has created a situation where CSXT's due process rights will be violated yet again.

CSXT first began raising the federal question presented in this Petition before the trial court when CSXT objected to the admission of certain evidence on the grounds that it permitted the jury to punish CSXT for harm to non-parties resulting in a deprivation of CSXT's rights to due process.

This evidence admitted over CSXT's objections included: (1) evidence of the vegetation on the right-of-way of dissimilar railroad crossings (Tr. 511:2-8; Tr. 514:2-514:7; Tr. 1346:15-1361:3; Tr. 1390:8-1395:7); (2) evidence related to dissimilar railroad crossings that failed safety inspection and were cited by state governments (Tr. 511:23-512:10; Tr. 1451:13-1453:10; Tr. 1448:10-1448:22; Tr. 1459:3-1463:15; Tr. 1467:25-1482:2; Tr. 1485:4-1486:7; Tr. 1732:20-1733:6; Tr. 1735:13-1736:8; Tr. 1935:8-1936:14); (3) evidence related to a vegetation control program implemented by a different railroad company in a different part of the country under different conditions at dissimilar railroad crossings not belonging to CSXT (Tr. 806:11-

829:25; Tr. 869:17-870:11); (4) evidence related to out-of-state activities (Tr. 890:14-892:4; Tr. 1523:8-1523:17); (5) evidence of dissimilar railroad crossing accidents (Tr. 511:14-511:22; Tr. 834:9-834:17; Tr. 836:10-849:2; Tr. 877:10-879:7); and (6) wholly collateral evidence which was completely non-causal introduced solely to appeal to the jury's passion or prejudice. (Tr. 2579:19-2619:23; Tr. 2612:11-2639:20; Tr. 2693:15-2695:4; Tr. 2581:23-2582:2; Tr. 2598:5-2599:13; Tr. 2600:17-2600:24.)

After this and other evidence was admitted over CSXT's objections, CSXT next raised the federal question presented in this Petition at the jury charge conference when CSXT proffered Defendant's Request for Charge No. 47, which instructed:

> A defendant's dissimilar acts, independent from the acts upon which liability is premised, may not serve as the basis for punitive damages. Assuming that you find [CSXT] liable for Gregory Williams' death, and assuming you find that [CSXT's] business practices are unsavory and reprehensible, you cannot award punitive damages on that basis. In order to award punitive damages, you must determine that [CSXT's] outrageous conduct, if any, was the conduct that you determined proximately caused Mr. Williams' death.

(Court's Exhibit 32) and when CSXT proffered Defendant's Request for Charge No. 52, which instructed:

> In determining the amount of punitive damages, if any, you may consider only CSXT's wrongful conduct, if any, that has, or has had, an impact on the citizens of South

> Carolina. You may not consider conduct outside the state of South Carolina.

(*Id.*)

Additionally, CSXT proffered Defendant's Proposed Special Verdict Form which permitted the jury to indicate upon which of the multiple theories presented at trial it found liability. (*See* Court's Exhibit 33, App. 31a – 36a.)

The trial court did not give CSXT's Requests for Charge Nos. 47 and 52. (*See* Tr. 2908:4-2977:21.) The trial court also refused to use Defendant's Proposed Special Verdict Form. (*Compare* Verdict Form, App. 28a – 30a *with* Defendant's Proposed Special Verdict Form, Court's Exhibit 33, App. 31a – 36a.)

In its post-trial motions, CSXT raised the federal question presented in this Petition for the third time before the trial court, moving for a judgment notwithstanding the verdict, on the ground that:

> The jury's award of punitive damages should be stricken and set aside following the Court's review of the award and application of the standards set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *BMW v. Gore*, 517 U.S. 559 (1996) and *State Farm v. Campbell*, 123 S. Ct. 1513 (2003) since the award of punitive damages violates CSXT's rights to due process of law under both the State and Federal Constitutions.

(CSXT's Motion for Judgment Notwithstanding the Verdict at ¶ 10.)

Additionally, CSXT moved for a new trial on the grounds that the trial court erred, as pertinent to this Petition, in the following ways:

> In failing to limit and properly charge punitive damages both initially and in connection with the explanation of the verdict form and in failing to properly charge the jury that the decision to award punitive damages is discretionary and that the plaintiff has no right to the recovery of damages;
>
> In improperly charging the law on punitive damages by failing to take into account the factors mandated by *State Farm v. Campbell*, 123 S. Ct. 1513 (2003), and;
>
> In failing to charge CSXT's requests for charges including numbers . . . 47 [and] 52 . . . pertaining to punitive damages.

(CSXT's Motion for a New Trial at ¶ 9 ddd;¶ 9 kkk; ¶ 9 lll.) The trial court denied CSXT's motion for judgment notwithstanding the verdict and motion for a new trial. (*See* App. 13a – 21a.)

CSXT appealed the trial court's ruling to the South Carolina Court of Appeals, and the case was subsequently transferred to the Supreme Court of South Carolina, where CSXT raised the following assignments of error relevant to the federal question presented in this Petition:

> The trial court erred in refusing to set aside a $4.5 million award of punitive damages and grant JNOV, because the award violated [CSXT's] rights to due process, where the award was based on evidence of violations of

> internal procedures and conduct unrelated to the conduct giving rise to liability, including out-of-state conduct . . .
>
> If CSXT is not entitled to judgment as a matter of law on the punitive damages claim, the erroneous admission of improper evidence of conduct unrelated to the conduct giving rise to liability . . . entitle[s] CSXT to a new trial. This result is further mandated by the erroneous admission of . . . evidence of a dissimilar accident [and] irrelevant and prejudicial evidence in rebuttal wholly outside the scope of CSXT's case in chief, and because the jury returned a verdict exhibiting badges of passion and prejudice.
>
> The trial court erred in refusing CSXT's (1) special verdict form, (2) proffered instructions on punitive damages . . . The trial court erred in giving confusing and doctrinally improper instructions on punitive damages . . .

(Appellant's Opening Brief, Statement of Issues on Appeal II, V and VI.)

The Supreme Court of South Carolina, in an unpublished opinion, reversed in part and remanded holding in pertinent part: (1) "several other more thoroughly developed theories of liability" were sufficient to sustain the verdict under South Carolina's "two issue rule," (2) the trial court properly denied the motion to set aside the verdict, and (3) the trial court did not abuse its discretion when it declined to give CSXT's requested jury instructions and declined to use CSXT's proposed special verdict form. (*See* App. 1a – 12a.) The Supreme Court of South Carolina remanded the case for a new trial solely on punitive damages

on the ground that the jury was erroneously instructed regarding Plaintiff's burden of proving punitive damages. (*Id.*)

CSXT then raised the federal question presented in this Petition before the Supreme Court of South Carolina at ¶ 1 of its petition for rehearing, which states in pertinent part:

> The Court's Opinion misapprehends or overlooks the impossibility of retrying this case on punitive damages only without violating the due process rights of CSXT as recognized in *State Farm v. Campbell*, 123 S. Ct. 1513 (2003) and this Court's decisions in *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 604 S.E.2d 385 (2004) and *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004). Because the jury on remand may only award lawful punitive damages on the basis of wrongful conduct causally related to the same wrongful conduct as that which injured the plaintiff, (citations omitted), the retrial must be held on both liability and damages, including punitive damages. This is required because, due to the failure to use a special verdict form at the first trial, there is no way for the second jury, the trial court, or this Court to determine what wrongful conduct the jury found under the "several . . . theories of liability in this case." Opinion at 3. A new trial on all issues is the only way to ensure that under *Campbell*, *Atkinson* and *Durham*, CSXT is not unconstitutionally punished for harm unrelated to that which injured the plaintiff, and that any award of punitive damages is limited solely to that conduct which is found to have injured the plaintiff.

The Supreme Court of South Carolina, in a vote of three to one, denied CSXT's petition for rehearing without analysis. (App. 22a – 25a.)

Thus CSXT properly raised and preserved, at each point in the proceedings below, the federal question presented to this Court concerning the application of the Due Process Clause of the Fourteenth Amendment and the four subsidiary questions regarding (1) whether the lower court failed to guard against jury confusion concerning the due process limitations on punitive damages; (2) whether sustaining the jury verdict under South Carolina's "two issue rule" and remanding for a new trial on punitive damages only will result in a due process violation; (3) whether the general verdict form is incompatible with procedural due process when a punitive damage award is based on non-causal conduct; and (4) whether the Supreme Court of South Carolina can remand the case for a new trial as to punitive damages under a mandate that requires admission of evidence of conduct dissimilar to conduct giving rise to liability without violating CSXT's procedural due process rights.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

This case involves a decision by the highest court of a state on a federal question -- due process standards for the imposition of punitive damages -- in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). Specifically, the Supreme Court of South Carolina has (1) ordered a new trial limited to punitive damages (2) using evidence of causally dissimilar conduct affecting only non-parties (3) even though the jury will not know what causally related conduct was employed by the first jury to find primary liability. As a consequence, the remand for trial on punitive damages has no safeguards against, and in fact

assures, that CSXT will face the risk of punitive damages founded on acts for which no punitive damages could properly lie under *Campbell* and *Phillip Morris*. The Supreme Court of South Carolina has also held that no procedures to guard against jury confusion concerning due process limitations on punitive damages need be employed in direct contravention of this Court's recent decision in *Phillip Morris*.

1. There Can Be No Retrial of this Case Limited to Punitive Damages Alone Consistent with Constitutional Requirements.

Under *Campbell* and *Phillip Morris*, there are federal due process limitations on the nature and amount of punitive damages that prevent a retrial limited to punitive damages alone. Under this Court's decisions, evidence used to support punitive damages must bear some relation to the plaintiff's harm. "A defendant's dissimilar acts, independent from acts on which liability was premised, may not serve as a basis for punitive damages." *Campbell*, 538 U.S. at 422. Punitive damages must only punish the defendant for conduct of the same nature as that which harmed the plaintiff. *Id.* at 423.

Here, due to the two issue rule and the trial court's denial of CSXT's request for a special verdict form, no one knows on what basis the trial jury found liability. As the Supreme Court of South Carolina noted in its decision, there were several theories of liability. (*See* App. 7a.) Neither the parties, the trial court, nor the Supreme Court of South Carolina could say which of these theories the jury employed as the basis for liability against CSXT. Thus, it is impossible in a retrial of only punitive damages to comply with the constitutional mandate that any award of punitive damages must be based only upon the conduct which the jury

concluded harmed the plaintiff. Since no one knows what that conduct was, due to the trial court's refusal to submit CSXT's requested special verdict form, what is the jury to be told on retrial was the basis for the first jury's liability finding? Absent such guidance and direction as to what allegedly wrongful conduct by CSXT gave rise to liability, and instruction that any punitive damages award must be limited solely to this conduct, CSXT's constitutional rights will be violated by any award of punitive damages. If, for example, the first jury returned its verdict based solely on the theory that vegetation obscured visibility at the crossing, then evidence of the ballast operator's conduct on retrial would not be permitted under *Campbell*. On the other hand, if the first jury returned its verdict based solely on the ballast operator's conduct, evidence of alleged excessive vegetation would not be permitted. Absent knowledge of the theory relied on by the first jury in returning its verdict, it is impossible for the trial court on remand to comply with this Court's requirement that punitive damages be based solely on conduct similar to that which caused the underlying harm to the plaintiff. Accordingly, the petition for certiorari should be granted.

2. Under *Phillip Morris* it was Error for South Carolina to Deny Procedural Protections to Prevent Jury Confusion on the Limitations on Punitive Damages.

Under *Phillip Morris*, upon request States are obligated to protect against the risk of jury confusion concerning the due process limits on punitive damages. *See* Slip Opinion at 10. By admitting dissimilar evidence relating only to third parties, without any procedural safeguards, the state legal system involved here created a "perfect storm" of due process violations under *Phillip Morris*, which now guarantees an unconstitutional result on retrial.

3. The Supreme Court of South Carolina's Application of the Two Issue Rule will Unconstitutionally Prevent the *De Novo* Review of Any Punitive Damages Award Following Retrial.

The lynchpin of the Supreme Court of South Carolina's decision to affirm the jury's liability determination notwithstanding unanimous acknowledgement of the trial court's error in charging the jury on negligence *per se* lies in the court's finding that the jury's general verdict stands supported by "several other . . . theories of liability . . ." (App. 7a.) As Justice Pleicones noted in dissent, the majority was invoking the two issue rule in effect though perhaps not in name. (App. 12a.)

The judicially crafted two issue rule allows affirmance of a general verdict where the jury returns a general verdict involving two or more issues and its verdict is *independently* supported as to at least one issue unaffected by error. *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 193, 336, S.E.2d 472, 473-74 (1985). Heretofore, the rule was not thought to apply where the party against whom the general verdict was entered requested a special verdict at trial. *Hussmann Refrigerator Supply v. Cash & Carry Grocer, Inc.*, 134 S.C. 191, 196, 132 S.E.173, 174 (1926) ("[W]hen there are several issues in the case submitted to a jury under full instructions, a general verdict in favor of one or the other of the parties, *in the absence of objection to the verdict not having passed upon the several issues separately*, will be held to have concluded all the issues") (emphasis added).

Additionally, while the decision to use a special verdict form is generally held to be within the trial court's discretion, that is not the case where there is a necessity for conducting the mandated *de novo* review of punitive

damages. *See Campbell*, 538 U.S. at 418; *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001). A *de novo* review cannot properly be conducted when the two issue rule, combined with a refusal to grant a request for a special verdict form, prevents the appellate court from ascertaining the underlying basis for punitive damages. A state-created rule of law that favors judicial efficiency over procedural due process cannot be constitutionally upheld.

4. The Decision Below is Constitutionally Impermissible Because Evidence of Unrelated Conduct Has Been Found to be Admissible without Procedures to Prevent the Jury from Punishing for that Conduct.

The Supreme Court of South Carolina correctly held in *Webb* that if the trial court admits any non-causally related evidence on the issue of punitive damages, then the error constitutionally compels reversal. 364 S.C. at 652-56, 615 S.E.2d at 447-49. The Court also held in *Webb* that where evidence that is relevant only to the issue of punitive damages is admitted generally in a non-bifurcated trial, then a new trial must be given on all issues. *Id.* Here, much of the same evidence that compelled reversal in *Webb* was admitted. Petitioner is not referring merely to similar evidence, but in several instances to identical evidence considered (and rejected on federal constitutional grounds) in *Webb*.

Inexplicably, the admission of this evidence was affirmed below, which is unconstitutional under *Campbell*. Under the normal operation of the mandate rule, matters affirmed by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court. *See Ackerman v. McMillan*, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (1996). The decision of the appellate court is final as to all questions decided, and it is the duty of the trial court to follow the

decision of the appellate court. *See id.* Consequently, given the Supreme Court of South Carolina's affirmance without discussion of the evidence CSXT challenged as improperly admitted, CSXT is at grave risk that it will have its due process rights violated again on retrial.

CONCLUSION

Nothing could be clearer than this Court's holding in *Campbell* and *Phillip Morris* that punitive damages must be based on harm to the plaintiff, and not on harm to others or on account of dissimilar conduct or conduct in other states. In the circumstances of this case, the Supreme Court of South Carolina has ruled in a manner that violates these principles.

Therefore, your petitioner prays that the Court will grant its writ of certiorari and take jurisdiction of this case. In the alternative, your petitioner prays that the Court will summarily grant the writ, vacate the decision below, and remand for further review in light of this Court's decision in *Phillip Morris*.

Respectfully Submitted,

E. Duncan Getchell, Jr.
Counsel of Record
Robert L. Hodges
J. Tracy Walker, IV
McGUIRE WOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-4319 (telephone)
(804) 698-2061 (facsimile)

Phillip E. Reeves
Ronald K. Wray, II
GALLIVAN, WHITE
& BOYD
55 Beattie Place
Suite 1200
Post Office Box 10589
Greenville, S.C. 29603
(864) 271-5362 (telephone)
(864) 271-7502 (facsimile)

COUNSEL FOR PETITIONER
CSX TRANSPORTATION, INC.

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APPENDIX

E. Duncan Getchell, Jr.
Counsel of Record
Robert L. Hodges
J. Tracy Walker, IV
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-4319 (telephone)
(804) 698-2061 (facsimile)

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GALLIVAN, WHITE & BOYD
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Suite 1200
Post Office Box 10589
Greenville, SC 29603
(864) 271-5362 (telephone)
(864) 271-7502 (facsimile)

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

APPENDIX A

THIS OPINION HAS NO PRECEDENTIAL VALUE, IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING, EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Eartha Mae Williams, as Personal Representative of the Estate of Gregory Stanley Williams, **Respondent/Apellant,**

v.

CSX Transportation, Inc., and Ronald Paul Bowen, **Defendants,**

of which CSX Transportation, Inc. is **Appellant/Respondent.**

Appeal From Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

Memorandum Opinion No. 2007-MO-001
Heard May 4, 2006 – Filed January 2, 2007

REVERSED AND REMANDED

Michael P. Horger, of Horger & Horger & Justice, of Orangeburg; Phillip E. Reeves and Ronald K. Wray, both of Gallivan, White & Boyd, PA, of Greenville; and J. Tracy Walker, IV and E. Duncan Getchell, Jr., both of McGuire Woods, of Richmond, Virginia for Appellant/Respondent.

C. Bradley Hutto, of Williams & Williams, of Orangeburg; John E. Parker and John Paul Detrick, both of Peters, Murdaugh, Parker, Elzroth & Detrick, PA, of Hampton; and Stacey Tarte Meyer, of Columbia, for Respondent/Appellant.

JUSTICE WALLER: This is a direct appeal from a jury verdict in a railroad-crossing case. Respondent/ Appellant Eartha Mae Williams (Plaintiff), as the personal representative of the Estate of Gregory Stanley Williams (Williams),[1] filed a wrongful death lawsuit against Appellant/Respondent CSX Transportation, Inc. (CSX). [2] The jury found in Plaintiff's favor awarding $4.5 million in compensatory damages and $7.5 million in punitive damages. The trial court reduced the punitive damages award to $4.5 million. CSX raises a number of issues on appeal, including *inter alia*, venue, bifurcation, jury charges, and punitive damages. In her cross-appeal, Plaintiff argues that the trial judge erred in reducing punitive damages. We affirm the jury's finding of liability but reverse the punitive damages award and remand for a new trial on punitive damages only.

FACTS

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[1] Williams was not married and had no child or other dependent. His sole beneficiary was Plaintiff, his seventy-six-year-old mother.

[2] Plaintiff also named a CSX employee, Ronald Paul Bowen, as a defendant; however, Bowen was voluntarily dismissed without prejudice prior to trial.

On the morning of January 3, 2001, Williams was driving his pick-up truck to work while CSX employee, Ronald Paul Bowen (Bowen), was operating one of CSX's ballast regulators.[3] Williams was driving westward when he approached a railroad crossing in the Town of Swansea; at the same time, Bowen was driving the ballast regulator northward. Thus, the ballast regulator approached the crossing from Williams' left, and Williams' truck approached from Bowen's right. The crossing was marked with a yellow railroad-crossing sign, a railroad cross on the road, and cross-bucks. A stop sign and a stop line were in front of the tracks. The two vehicles collided at the crossing, and Williams was killed in the crash.

At trial, Plaintiff put forth several negligence theories. First, Plaintiff asserted CSX was negligent for failing to adequately maintain the vegetation along the tracks at the crossing and, as a result, the blocked line of sight did not allow Williams to see the ballast regulator as it approached. Plaintiff also asserted that CSX was vicariously liable for Bowen's negligent operation of the ballast regulator. According to Plaintiff, Bowen was driving the regulator at an unreasonable, reckless speed, and he failed to sound the regulator's horn to warn that the regulator was approaching the crossing. Additionally, Plaintiff asserted that CSX was directly negligent in permitting Bowen to operate the ballast regulator without first providing him proper training and that the lack of such training caused Bowen's careless operation of the regulator.

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[3] A ballast regulator is a very large piece of equipment that travels on the rails like a train and is used to maintain the tracks. It resembles a large bulldozer.

CSX denied each allegation and maintained that Williams was negligent in failing to yield the right of way to Bowen and for pulling out in front of the ballast regulator.

The jury found CSX negligent and awarded Plaintiff $4.5 million in compensatory damages plus $7.5 million in punitive damages. After a post-trial hearing, the trial judge reduced the punitive-damages award to $4.5 million.

ISSUES

1. Did the trial court err in charging the jury on the doctrine of negligence *per se*?

2. Did the trial court erroneously charge the jury on the burden of proof regarding punitive damages?

DISCUSSION

1. Negligence *Per Se*

CSX argues several issues on direct appeal including that the trial court erred by charging the jury on negligence *per se*. We find that although the negligence *per se* charge should not have been given, CSX cannot establish prejudice.

At trial, Plaintiff sought to prove that CSX failed to adequately train Bowen to operate the ballast regulator and Bowen's insufficient training resulted in his negligent operation of the ballast regulator. Specifically, Plaintiff argued that if the jury found that CSX had failed to comply with a federal regulation[4] requiring railroad companies to adequately train employees who operate maintenance machines, such as ballast regulators, CSX's negligence

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[4] 49 C.F.R. § 214.355 (2005).

would be presumed under the doctrine of negligence *per se*. The trial court agreed and charged the jury as follows:

> Ladies and gentlemen, I want to talk to you about the area of law that's called negligence *per se*. Negligence *per se*. Now, the violation of a statute or the violation of a regulation that has the force and effect of a statute is negligence *per se*. That is, violation of a statute or regulation with the force and effect is negligence in and of itself....
>
> Negligence *per se* is established by showing that the statute – a statute created a duty and that the duty was breached by violating the statute. To show that a duty of care is owed from a statute two things would be shown, must be shown. One, that the essential purpose of the statute is to protect from the kind of harm suffered; and secondly, that the person claiming the violation of the statute is a member of the class of persons that the statute is intended to protect.[5]
>
> . . .

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[5] This was a correct statement of the law of negligence *per se*. See Norton v. Opening Break of Aiken, Inc., 319 S.C. 469, 469-70, 462, S.E.2d 861, 861-62 (1995) (providing that violation of a regulation that has the force of law, just like violation of a statute, can constitute negligence *per se*); Whitlaw v. Kroger Co., 306 S.C. 51, 53, 410 S.E.2d 251, 252 (1992) (providing the two-pronged test for determining whether a statute imposes on a defendant a duty to the plaintiff, and providing that breach of the statute establishes negligence *per se*, leaving only causation and damages to be determined).

> Now, ladies and gentlemen, I further charge you ... Section 214.355 ... reads as follows: "The training and qualification of roadway workers who operate roadway maintenance machines shall include, as a minimum, procedures to prevent a person from being struck by the machine when the machine is in motion or operation, procedures to provide for stopping the machine short of other machines or obstructions on the track, methods to determine safe operating procedures for each machine that the operator is expected to operate. Initial and periodic qualification of a roadway worker to operate roadway maintenance machines shall be evidenced by a demonstrated proficiency."[6]

We find that this charge was erroneously given because section 214.355 was intended to protect railroad employees, not public motorists. See 49 C.F.R. § 214.1(a) (2005) ("The purpose of this part is to prevent accidents and casualties **to employees** involved in certain railroad inspection, maintenance and construction activities.") (emphasis added); id. § 214.301(a) ("The purpose of this subpart is to prevent accidents and casualties caused by moving railroad cars, locomotives or roadway maintenance machines **striking roadway workers** or roadway maintenance machines.") (emphasis added). Because it is clear Williams was not a member of the class of persons intended to be protected by Section 214.355, the trial court's negligence *per se* charge was error. See Whitlaw, 306 S.C. at 53, 410 S.E.2d at 252.

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[6] This was a word-for-word reading of the regulation. See 49 C.F.R. § 214.355 (2005).

Nonetheless, "the giving of an erroneous instruction is not reversible error, unless the appellant can show that he was injured and prejudiced thereby." Ellison v. Simmons, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961). We find CSX has not made a sufficient showing of prejudice.

While the violation of a regulation may constitute negligence *per se*, this only establishes the duty and breach elements of a negligence claim. In addition to duty and breach, a plaintiff also must show that the violation of the regulation "was causally linked, both in fact and proximately, to the injury." Seals v. Winburn, 314 S.C. 416, 418, 445 S.E.2d 94, 96 (Ct. App. 1994); see also Whitlaw, 306 S.C. at 54, 410 S.E.2d at 25 ("Violation of the statute ... is not conclusive of liability"); Trivelas v. S.C. Dep't of Transp., 348 S.C. 125, 134, 558, S.E.2d 271, 275 (Ct. App. 2001) (the finding of a statutory violation does not automatically lead to the recovery of damages). Given the several other, more thoroughly developed theories of liability in this case, we do not believe that the negligence *per se* charge on 49 C.F.R. § 214.355 materially prejudiced CSX.

Accordingly, we hold that under the circumstances of this case, the trial court's negligence *per se* charge does not constitute reversible error.

2. Punitive Damages Charge

CSX also argues that the trial court erred in charging the jury on Plaintiff's burden of proving punitive damages. We agree.

The trial court charged the jury on punitive damages as follows in pertinent part:

> Therefore, **while the quality of the evidence in order for the plaintiff to recover punitive**

> **damages from the defendant must be clear and convincing, the proof may be met by a preponderance of the evidence.** Let me explain that for you, if I may.
>
> What do we mean by clear and convincing evidence? Clear and convincing evidence is evidence that is clear, specific, definite, and convincing in nature. Imagine if you reach the issue of punitive damages, imagine the scales again. You wouldn't put the evidence on the scale unless the evidence was clear, specific, definite and convincing in nature, you wouldn't put it, you wouldn't consider it, **you wouldn't put it on the scales unless it was clear and convincing, but still the burden of proof regarding punitive damages is still by a preponderance of the evidence.**

(Emphasis added.)

When instructing the jury, the trial court is required to charge only the current and correct law of South Carolina. E.g., McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995). "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135 (2005). Clear and convincing evidence is "that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." Anonymous v. State Bd. Of Med. Exam'rs, 329 S.C. 371, 374 n.2. 496 S.E.2d 17, 18 n.2 (1996) (citations and internal quotations omitted). It is an intermediate standard, "more than a mere preponderance but less than is required for proof beyond a reasonable doubt." Id.

The trial court's jury instructions in this case misstated the standard of proof for clear and convincing evidence. First, the charge did not reasonably convey that clear and convincing was a higher degree of proof than a preponderance of the evidence, which the trial court had previously explained was the standard for proving CSX's negligence. Second, the trial court's charge left the jury with the impression that the standard or proof remained a preponderance of the evidence and that only those pieces of evidence determined by the jury to be "convincing" were to be considered in arriving at their verdict. The above-emphasized portions of the charge indicate that the trial court apparently confused the two burdens of proof, and therefore, the charge on the burden of proof was erroneous and requires a new hearing on punitive damages. See Dunsil v. E. M. Jones Chevrolet Co., 268 S.C. 291, 295, 233 S.E.2d 101, 103 (1977) (where the trial judge "jumbled propositions of law" and the instructions by the court resulted in the jury being charged irrelevant and inapplicable principles of law, the jury charge was held to be reversible error).

CSX's remaining issues on appeal are affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: Issue I: Turner v. Santee Cement Carriers, Inc., 277 S.C. 91, 94, 282, S.E.2d 858, 859 (1981) ("A motion for change of venue is addressed to the sound discretion of the trial judge, whose ruling will not be disturbed unless it appears that manifest legal error was committed.") (citations omitted); Issue II: Rule 42(b), SCRCP (the trial court has the discretion to bifurcate a trial); Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 9, 466 S.E.2d 727, 731 (1996) (the denial of a discretionary motion will not be reversed on appeal absent a showing of abuse of discretion); Issue III: Jinks v. Richland County, 355 S.C. 341, 345, 585, S.E.2d 281, 283 (2003) (in ruling on a motion for JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most

favorable to the party opposing the motion and to deny the motion where the evidence yields more than one inference); Issue IV: Simmons v. Atlantic Coast Line R.R. Co., 250 S.C. 199, 203, 157 S.E.2d 172, 175 (1967) (unless there is proof to the contrary, it is presumed that a person observed the law and conducted himself as a person of ordinary prudence, reason and care); Issue V: Gamble v. Stevenson, 305 S.C. 104, 107, 406 S.E.2d 350, 352 (1991) (the determination as to whether special verdict forms should be submitted to the jury is within the sound discretion of the trial judge); Lever v. Wilder Mobile Homes, Inc., 283 S.C. 452, 454, 322 S.E.2d 692, 694 (the trial court's refusal to give requested instructions is not prejudicial error where the instructions actually given afford the proper test for determining the issues); and Issue VI: Pelican Bldg. Ctrs. Of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) (the jury's determination of damages is entitled to substantial deference); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004) (the decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and will not ordinarily be disturbed on appeal).

CONCLUSION

In sum, we affirm the jury's determinations regarding CSX's liability and the compensatory damages award. However, because of the erroneous jury charge on the burden of proof for punitive damages, we reverse the award of punitive damages and remand for a new trial on punitive damages.[7]

REVERSED AND REMANDED.

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[7] We note that because there will be a new punitive damages hearing, it is unnecessary to reach Plaintiff's cross-appeal issue of whether the trial court erred in reducing the punitive damages award.

TOAL, C.J., MOORE, J., and Acting Justice L. Casey Manning, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I agree with the majority that the punitive damages award must be reversed, but would hold that the erroneous charge on negligence *per se* requires that we reverse the jury verdict in its entirety and order a new trial.

The majority holds that the charge, while erroneous, did not materially prejudice CSX because the jury verdict was supported by "several other, more thoroughly developed theories of liability . . . ." In effect though not in name, the majority is invoking the two issue rule. This rule provides that "where a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed." Anderson v. West, 270 S.C. 184, 188, 241 S.E.2d 551, 553 (1978); accord Bryant v. Waste Mgmt., Inc., 342 S.C. 159, 167-68, 536 S.E.2d 380, 384-5 (Ct. App. 2000) (applying the rule in a case involving six theories of negligence). The rule does not and should not operate against a party, such as CSX which requested the jury be given a special verdict form rather than a general form.[8] See Harry L. Hussmann Refrigerator & Supply Co. v. Cash & Carry Grocer, Inc., 134 S.C. 191, 132 S.E. 173 (1926). The reason for this exception to the two issue rule is obvious: had the party's request been granted, we would be able to discern whether the erroneous charge was relied upon by the jury, and thus the question of prejudice would be clear. Under these circumstances, where the affected party has made every effort to protect its right to a fair trial, precedent and justice require we reverse the tainted verdict and grant a new trial.

I respectfully dissent and would grant CSX a new trial.

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[8] I note the majority affirmed the judge's decision to deny CSX's request.

APPENDIX B

2004 Jun 21 PM 1:01
FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC

STATE OF SOUTH CAROLINA	)	
COUNTY OF ORANGEBURG	)	**IN THE COURT**
	)	**OF COMMON**
	)	**PLEAS**
EARTHA MAE WILLIAMS as	)	
Personal Representative of the	)	**C/A No. 01-CP-38-**
Estate of GREGORY STANLEY	)	**103**
WILLIAMS	)	
	)	
Plaintiff,	)	**ORDER**
	)	
v.	)	
	)	
CSX TRANSPORTATION, INC.	)	
and RONALD PAUL BOWEN,	)	
	)	
Defendants.	)	

This matter came before me on January 7, 2004, in Orangeburg for a hearing on the defendants' post-trial motions and for a post-trial review of the punitive damage verdict in the case. The defendant moves for a judgment notwithstanding the verdict, new trial, and new trial *nisi remittitur*.

ATTEST: TRUE COPY
/S/ LISA W. MIZELL
CLERK OF COURT
ORANGEBURG COUNTY,
SOUTH CAROLINA

Our Supreme Court in *Gamble v. Stevenson*, 305 S.C. 104, 406, S.E.2d 350 (1991) held that to ensure that any award of punitive damages is proper, the trial court shall conduct a post-trial review and may consider the following:

> (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haislip,* "other factors" deemed appropriate.

The court further held that the review should be dedicated to the postulate that an award should not be grossly disproportionate to the severity of the offense. The court in *Gamble* held that the trial court should set forth its findings on the record. id. at 354.

In addition to the *Gamble v. Stevenson,* id., factors, the Court has reviewed the punitive damage award applying the principles enunciated in *State Farm v. Campbell*, 123 S.Ct. 1513 (2003). The United States Supreme Court "has instructed courts reviewing punitive damage awards to consider (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between actual or potential harm suffered by the plaintiff and the punitive damage award, and (3) the difference between the punitive damage awarded by the jury and the civil penalties authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996). If the case involves a question of whether or not the punitive damages are excessive under constitutional standards, the court is required to review the facts of the case *de novo. Cooper*

Industries v. Leatherman Tool, 532 U.S. 436, 121 S.Ct. 1678 (2002).

After reviewing the evidence *de novo*, the court makes the following findings of fact. The evidence at trial established that Mr. Williams' death was caused by the recklessness of CSX's employee in operating its ballast regulator in violation of the company rules and in failing to sound the horn to warn Mr. Williams. Mr. Williams stopped the truck he was driving at the stop sign at the crossing. After stopping, he proceeded and the vehicle was struck by the ballast regulator. The uncontroverted evidence was that the rules of CSX required that the ballast regulator operator approach the crossing prepared to stop. Mr. Bowen was not prepared to stop as he approached the crossing. The CSX operating rules also limit the speed of ballast regulators at highway grade crossings to 5 m.p.h. The evidence established that the ballast regulator was traveling at least 15 m.p.h. and probably 20 m.p.h. or greater at the time of the collision. The ballast regulator operator testified that he was aware of the rule requiring him to approach the crossing prepared to stop. He testified he was unaware of the 5 m.p.h. speed restriction at road crossings. Even though the ballast operator was aware of the rule requiring him to approach the crossing prepared to stop, he consciously failed to comply with the rule.

The evidence also established that CSX had failed to maintain the vegetation at the crossing on its right-of-way. The evidence at trial established that CSX even though it was aware of the need for properly maintaining its right-of-way had failed to clear the right-of-way of vegetation, which obstructed the view of motorists. Elizabeth Hughes, who had used the crossing for years, testified that the vegetation at the crossing had obstructed her view at the crossing for years. CSX's vice-president of engineering admitted that CSX had not looked at crossing safety from a motorist's point of view

in a comprehensive way. He also admitted CSX had not given its employees any training in how to inspect crossings for sight distance obstructions. The vegetation at the crossing violated CSX's maintenance standard. CSX's internal memoranda proved that prior to Mr. Williams' death, CSX had been advised by a contractor that it had allowed tall woody vegetation on its right-of-way to obstruct the line of sight of motorists. CSX was also advised that this failure to control the vegetation on its right-of-way at road crossings was resulting in loss of life. Another memorandum stated that CSX had not budgeted sufficient funds to kill the brush and trees on its right-of-way.

Prior to Mr. Williams' death, CSX had discussed instituting a plan to remove sight-obstructing vegetation on its right-of-way at its crossings, but it had not acted on the plan. A management official of another railroad had advised CSX before Mr. Williams' death that when it cleared sight-obstructing vegetation at its crossings, it had reduced collisions by 27% and reduced claims cost by 46%. This official also advised that since clearing its crossings the railroad, for which he worked, had not had a single claim on account of vegetation.

In South Carolina the SCDOT had notified CSX of numerous crossings in South Carolina at which vegetation obstructed a motorist's view. CSX was notified of these obstructed crossings pursuant to § 58-17-1450, South Carolina Code (1976). Under this section of the law, a railroad has 60 days to correct a sight obstruction at a crossing. If it does not correct the deficiency, there is a civil penalty of $500.00 plus $100.00 per day thereafter for the failing to remove the sight obstruction. CSX prior to Mr. Williams' death had been notified of penalties in the amount of $349,100.00 for failing to correct sight obstructions.

All of the evidence established that CSX had a long standing problem with vegetation control at its crossing including the Fifth Street crossing in Swansea. The condition of these crossings was the result of CSX not having a comprehensive vegetation control program. The evidence established that in its efforts to increase profits by cutting costs, CSX had sacrificed safety.

CSX was placed on notice of the lack of a comprehensive brush control program by a 1997 Federal Railroad Administration audit which concluded that CSX did not have a large scale comprehensive brush control program. Even though it was notified of this failure, CSX apparently took no action to improve sight distance at its road crossings prior to Mr. Williams' death.

The evidence at trial established that CSX's conduct was willful, wanton, and in reckless disregard of Mr. Williams' rights. A conscious failure to exercise due care constitutes willfulness. *McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995). A defendant's conscious decision to make profits a priority over safety is reprehensible. *Watkins v. Ford Motor Co.*, 190 F.3rd 1213 (11th Cir. 1999). The Court in reviewing the evidence finds that the defendant's conduct was sufficiently reprehensible to sustain the jury's verdict. The evidence also established that the conduct of CSX in maintaining unsafe crossings was of a long duration.

A CSX employee, William Kemp, testified that many years ago before CSX took over the railroad that the road crossings were maintained with a sufficient sight distance, but that when CSX took over it quit removing sight-obstructing vegetation at the crossings. The evidence also established that the high management officials of CSX were aware of the unsafe conditions of CSX's crossings in South Carolina.

The Court also finds that the punitive damage award is reasonably related to the harm likely to result from CSX's conduct and that the award is appropriate to deter CSX and others from engaging in like conduct. The Court reviewed CSX's ability to pay. Dr. Oliver Wood testified that CSX has a net worth of 5.5 billion dollars, and the award even though significant will not cause CSX unreasonable financial difficulty.

In addition to the *Gamble v. Stevenson* factors, the court has reviewed the award using as guide the factors set forth in *State Farm v. Campbell, supra.* In *Campbell* the court held that courts must ensure that the punishment occasioned by an award of punitive damages must be both reasonable and proportionate to the amount of harm to the plaintiff and the general damages sustained. The court also pointed out that the compensatory damages awarded by the jury may also contain a punitive component which may be duplicative of the punitive damage award. The court recognized that in many cases in which compensatory damages include an amount for emotional distress caused by the defendant's act, there is no clear line between punishment and compensation and a verdict for a specified amount frequently evidences both.

The defendant has moved to set aside the award for actual damages as excessive and the Court will address that issue later in the order. In recognition of the overlapping of damages, the Court believes that the award of punitive damages in the case of 7.5 million dollars should be reduced by 3 million dollars. The Court is of the opinion that the amount will sufficiently punish the defendant to deter it and others from like conduct. The court in *State Farm v. Campbell* held that when compensatory damages are substantial, that a ratio of punitive damages equal to compensatory damages can reach the outermost limits of the due process guarantee. Even though the Court does not

believe the award in this case reached the outermost limits of the due process guarantee, the Court believes in considering the total verdict and the facts of the case the reduction in punitive damages is warranted.

The defendant moves for a judgment notwithstanding the verdict. As grounds for its motion CSX asserts that the plaintiff's claims of improper maintenance of its right-of-way is preempted under state and federal law. The Court for the reasons stated during the trial of the case believes that there was sufficient evidence to submit the issue of CSX's improper maintenance of the crossing to the jury.

CSX contends that there was not any evidence presented to the jury that its employee was negligent in the operation of its ballast regulator. The evidence at trial when viewed in light most favorable to the plaintiff established that Mr. Bowen violated the company rules in the operation of the ballast regulator. He also failed to sound the horn to give warning of the approach of the ballast regulator. A violation of the railroad's operating rules by an employee is imputable to the railroad and may be considered as evidence of negligence. *Eastern Brick and Tile Co. v. United States*, 281 F. Supp. 216 (D.S.C. 1968). There was ample evidence for the jury to conclude that the operator of the ballast regulator was negligent and reckless.

CSX sets forth a number of other grounds for a judgment notwithstanding the verdict which were all ruled upon during the trial. For the reasons set forth during the trial the Court finds that there are not any grounds upon which the Court could grant the defendant's motion for a judgment notwithstanding the verdict.

The defendant also moves for a new trial, on the grounds that the verdict is contrary to the weight of the evidence, contrary to the law, excessive and improperly

influenced by passion, prejudice, sympathy, caprice, bias or other improper factors. The Court has the authority to grant a new trial where the verdict is contrary to the law and evidence. *Watford v. South Carolina State Highway Dept.*, 269 S.C. 130, 236 S.E.2d 153 (S.C. 1938). The Court finds that the evidence presented at trial supports the jury's verdict, and the jury's verdict was consistent with the law as charged by the Court.

CSX also moves to set aside the actual damage verdict as being excessive. The jury's determination of damages is entitled to substantial deference. *Knoke v. South Carolina Dept. of Parks, Recreation and Tourism*, 234 S.C. 136, 478 S.E.2d 256 (S.C. 1996). In order to set aside the verdict as excessive, the Court would have to find that the verdict was actuated by passion, caprice, or prejudice. *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431, S.E.2d 557 (S.C. 1993). The jury was extremely attentive to the evidence in the case. The evidence established that the deceased was an unusually kind and considerate citizen. His character was exemplary. He and his mother, his sole beneficiary, were extremely close. Mr. Williams and his mother ate all of their meals together, and he cared for her needs. They were together on a daily basis. Mrs. Williams suffered extreme mental anguish as a result of not being able to see her son's body because of the brutal nature of his injuries. The verdict was commensurate with the loss, and the Court is of the opinion that the verdict was not actuated by passion, capriciousness, or prejudice.

The Court, in considering the punitive damage award, considered that an award for actual damages may contain a punitive element. The Court in determining whether or not the award was excessive looked at other similar cases decided by our appellate courts. In *Knoke v. S.C. Department of Parks, Recreation and Tourism*, id., affirmed a verdict of three million dollars for the death of a minor

child. In *Hand v. U.S.*, 134 F. Supp.2d 745 (D.S.C. 2001), the United States District Court awarded six million dollars for the loss of an unemancipated child. As stated by the court in *Scott v. Porter*, 340 S.C. 158, 530 S.E.2d 389 (S.C. App. 2000), there is no mathematical formula which can easily establish the value of this "kind of loss," and it is not the Court's place to do so. The Court finds that the actual damage award was not the result of any improper motive, and is not excessive.

The defendant moves for a new trial on numerous other grounds, which were ruled upon at the trial of the case. The Court has reviewed these grounds and does not find any error in the Court's rulings, which would warrant a new trial. The defendant's motion for a new trial is denied. It is therefore,

Ordered that the defendant's motions for a judgment notwithstanding the verdict, for a new trial, and for a new trial remittitur are denied. It is further

Ordered that the verdict for punitive damages is reduced from seven and one-half million dollars to four and one-half million dollars.

By: /s/ Diane S. Goodstein
Presiding Judge

Charleston, SC
June 10, 2004

APPENDIX C

THE SUPREME COURT OF SOUTH CAROLINA

DANIEL E. SHEAROUSE
CLERK OF COURT

POST OFFICE BOX 11330
COLUMBIA, SOUTH
CAROLINA 29211

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

(803) 734-1080
FAX (803) 734-1499

January 31, 2007

Phillip E. Reeves, Esquire
Ronald K. Wray, Esquire
Gallivan, White & Boyd, PA
P. O. Box 10589
Greenville, SC 29603

Re: Williams, Eartha v. CSX Transportation

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing:

"Petition for rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

I would grant rehearing.

s/ Costa M. Pleicones J.

Justice E. C. Burnett, III,
not participating

January 31, 2007."

The remittitur is today being forwarded to the lower court.

Very truly yours,

/s/ Daniel E. Shearouse
Clerk

DES/jjp

cc: J. Tracy Walker, IV, Esquire
E. Duncan Getchell, Jr., Esquire
Michael P. Horger, Esquire
C. Bradley Hutto, Esquire
John E. Parker, Esquire
John Paul Detrick, Esquire
Stacey Tarte Meyer, Esquire

THE SUPREME COURT OF SOUTH CAROLINA

DANIEL E. SHEAROUSE
CLERK OF COURT

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

(803) 734-1080
FAX (803) 734-1499

January 31, 2007

REMITTITUR

The Honorable Lisa Mizell
190 Gibson Street
PO Box 9000
Orangeburg, SC 29116-9000

Re: Williams, Eartha v. CSX Transportation –
2001-CP-38-00103

Dear Ms. Mizell:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

s/ Daniel E. Shearouse
CLERK

DES/jjp

Enclosure

cc: (without enclosure)
J. Tracy Walker, IV, Esquire
E. Duncan Getchell, Jr., Esquire
Michael P. Horger, Esquire
Phillip E. Reeves, Esquire
Ronald K. Wray, Esquire
C. Bradley Hutto, Esquire
John E. Parker, Esquire
John Paul Detrick, Esquire
Stacey Tarte Meyer, Esquire

APPENDIX D

STATE OF SOUTH CAROLINA) JUDGMENT ON
) TRIAL OR
COUNTY OF ORANGEBURG) ORDER BY THE
) COURT
COURT OF COMMON PLEAS)

CASE No. 01-CP-38-103

EARTHA WILLIAMS vs. CSX

PLAINTIFF(S) DEFENDANT(S)

(x) JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY. THE ISSUES HAVE BEEN TRIED AND THE JURY HAS RENDERED ITS VERDICT.

( ) DECISION BY COURT. THIS ACTION CAME TO TRIAL OR HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN TRIED OR HEARD AND A DECISION HAS BEEN RENDERED.

( ) ACTION DISMISSED. ( ) RULE 40(J) OF SCRCP
( ) RULE 12 (B) OF SCRC, ( ) SETTLED,
( ) VOL. NONSUIT. ( ) OTHER

IT IS ORDERED AND ADJUDGED BY COURT:

4 miliion five hundred thousand actual damages

7 million five hundred thousand punitive damages

JR 2003-1342

DATED AT ORANGEBURG, SOUTH CAROLINA, THIS 30 DAY OF OCT., 2003.

S/ DIANE S. GOODSTEIN
JUDGE/CLERK OF COURT

THIS JUDGMENT WAS ENTERED ON THE 30 DAY OF OCT., 2003

AND A COPY MAILED FIRST CLASS THIS 30 DAY OF OCT., 2003;

TO ATTORNEYS OF RECORD OR TO PARTIES (WHEN APPEARING PRO SE) AS FOLLOWS:

Paul Detrick
John E. Parker

ATTORNEY(S) FOR PLAINTIFF(S)

Mike Horger
Roswell Page
Tracy Walker

ATTORNEY(S) FOR DEFENDANT(S)

APPENDIX E

STATE OF SOUTH CAROLINA	**COURT OF**
COUNTY OF ORANGEBURG	**COMMON**
	PLEAS
EARTHA MAE WILLIAMS,	
AS PERSONAL REPRESENTATIVE	**CASE NO.**
OF THE ESTATE OF GREGORY	**01-CP-38-103**
STANLEY WILLIAMS	
Plaintiff,	
	SPECIAL
VS.	**VERDICT**
	FORM
CSX TRANSPORTATION, INC.	
Defendant.	

1. Do you find that the Defendant was negligent and that such negligence proximately caused the Plaintiff's Decedent's death?

__x__ YES. If you answer yes, GO TO QUESTION 2.
_____ NO. If you answer no, STOP AND DELIBERATE NO FURTHER.

2. Do you find that the Plaintiff's Decedent was negligent and that such negligence proximately caused his death?

_____ YES. If you answer yes, GO TO QUESTION 3.
__x__ NO. If you answer no, GO TO QUESTION 4.

3. If your answers to both Question Number 1 and Question Number 2 are YES, then answer this question:

Taking the combined negligence that proximately caused the Plaintiff's decedent's death as one hundred percent (100%), what percentage of that negligence is attributable to the Plaintiff's Decedent and what percentage is attributable to the Defendant? (The percentages must add up to 100%).

Plaintiff's Decedent: _____%
Defendant: _____%
Total 100%

If the Plaintiff's Decedent's percentage of the combined negligence is greater than 50%, STOP AND DELIBERATE NO FURTHER.

If the Plaintiff's Decedent's percentage of the combined negligence is 50% or less, GO TO QUESTION 4.

4. Please state the total amount of damages sustained by the Plaintiff. $4,500,000 or Four Million Five-Hundred Thousand (dollars) actual damages.

If you find that the Plaintiff sustained actual damages then you may consider the issue of punitive damages.

5. Please state the total amount of punitive damages, if any to be awarded to the Plaintiff. $7,500,000 or Seven Million Five-Hundred Thousand (dollars) punitive damages.

IF YOUR ANSWER TO QUESTION 2 ON THE FIRST PAGE WAS YES, DO NOT REDUCE THE AMOUNT OF DAMAGES BY THE PERCENTAGE OF NEGLIGENCE ATTRIBUTED TO PLAINTIFF'S DECEDENT IN QUESTION NUMBER 3 ON THE FIRST PAGE.

Please sign and date:

/s/ Dorothy S. Taylor
Presiding Juror

October 30, 2003
Date

APPENDIX F

COURT'S EXHIBIT 33
Defendant's Proposed Special Verdict Form

1. Did CSX Transportation, Inc. fail to properly maintain the vegetation at the Fifth Street Crossing?

Yes _____ No _____

2. If the answer to Question 1 is yes, then was CSX Transportation, Inc. negligent in failing to properly maintain the vegetation at the Fifth Street Crossing?

Yes _____ No _____

3. If the answer to Question 1 and 2 is yes, then was CSX Transportation, Inc.'s negligence in failing to properly maintain the vegetation at the Fifth Street Crossing a proximate cause of the collision between the ballast regulator and Gregory Williams' truck and Gregory Williams' death?

Yes _____ No ____

4. Was Ronald Bowen unqualified and incompetent to operate a ballast regulator on January 3, 2001?

Yes _____ No _____

5. If the answer to Question 4 is yes, then was CSX Transportation, Inc. negligent in allowing Ronald Bowen to operate a ballast regulator on January 3, 2001?

Yes _____ No _____

6. If the answer to question 4 and 5 is yes, then was CSX Transportation, Inc.'s negligence in allowing Ronald

VI. THE TRIAL COURT DID NOT ADMIT EVIDENCE IN VIOLATION OF *CAMPBELL* OR *PHILIP MORRIS* 12

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CONCLUSION 25

Bowen to operate a ballast regulator on January 3, 2001, a proximate cause of the collision between the ballast regulator and Gregory Williams' truck and Gregory Williams' death?

Yes _____ No _____

NEGLIGENCE

1.A. Do you find that CSX Transportation, Inc. negligently failed to maintain the vegetation at the Fifth Street Crossing?

Yes _____ No _____

1.B. If so, do you find that CSX Transportation, Inc.'s failure to properly maintain the vegetation at the Fifth Street Crossing was a proximate cause of the collision?

Yes _____ No _____

2.A. Do you find that Ronald Bowen operated the ballast regulator at an excessive speed?

Yes _____ No _____

2.B. If so, do you find that Ronald Bowen's operation of the ballast regulator at an excessive speed was a proximate cause of the collision?

Yes _____ No _____

3.A. Do you find, apart from speed, that Ronald Bowen was negligent in his operation of the ballast regulator?

Yes _____ No _____

3.B. If so, do you find that Ronald Bowen's operation of the ballast regulator, apart from speed, was a proximate cause of the collision?

Yes _____ No _____

4.A. Do you find that Ronald Bowen negligently failed to sound the horn on the ballast regulator?

Yes _____ No _____

4.B. If so, do you find that Ronald Bowen's negligent failure to sound the horn on the ballast regulator was a proximate cause of the collision?

Yes _____ No _____

5.A. Do you find any other negligent conduct on the part of CSX Transportation, Inc. that you find was a proximate cause of the collision?

Yes _____ No _____

5.B. If so, describe the negligent conduct of CSX Transportation, Inc.

_____

_____

6.A. Do you find that Gregory Stanley Williams negligently failed to stop his pickup truck in a position where he could fully observe the ballast regulator approaching the crossing?

Yes _____ No _____

6.B. If so, do you find that Gregory Stanley Williams' failure to stop his pickup truck in a position where he could

fully observe the ballast regulator approaching the crossing was a proximate cause of the collision?

Yes _____ No _____

7.A. Do you find that Gregory Stanley Williams failed to yield the right of way to the ballast regulator approaching the crossing?

Yes _____ No _____

7.B. If so, do you find that Gregory Stanley Williams' failure to yield the right of way to the ballast regulator approaching the crossing was a proximate cause of the collision?

Yes _____ No _____

8.A. Do you find that Gregory Stanley Williams failed to keep a proper lookout?

Yes _____ No _____

8.B. If so, do you find that Gregory Stanley Williams' failure to keep a proper lookout was a proximate cause of the collision?

Yes _____ No _____

9.A. Do you find that Gregory Stanley Williams failed to exercise due care in the operation of his pickup truck at the fifth Street crossing?

Yes _____ No _____

9.B. If so, do you find that Gregory Stanley Williams' failure to exercise due care in the operation of his pickup

truck at the Fifth Street Crossing was a proximate cause of the collision?

Yes _____ No _____

10. If you found that Gregory Stanley Williams' negligence was a proximate cause of the collision, do you find that Gregory Stanley Williams' conduct was reckless or willful?

Yes _____ No _____

COMPENSATORY DAMAGES

11. If you found that either or both CSX Transportation, Inc. and Gregory Stanley Williams were negligent and their negligence was a proximate cause of the collision, state the percentage fault you attribute to each:

CSX Transportation, Inc. _____ %
Gregory Stanley Williams _____ %

12. If you find that Gregory Stanley Williams' fault was more than 50%, then please stop here. You have completed your deliberations.

13. If you found that CSX Transportation, Inc. was 50% or more, what compensatory damages, if any, do you find for Eartha Mae Williams? $ _____

PUNITIVE DAMAGES

14. If you found that CSX Transportation, Inc. was at fault, in whole or in part, for the collision, do you find that CSX Transportation, Inc.'s conduct was willful, reckless and in conscious disregard of Gregory Stanley Williams' rights; thus justifying an award of punitive damages?

Yes _____ No _____

15. If so, what conduct of CSX Transportation, Inc. do you find to have been willful, reckless and in conscious disregard of Gregory Stanley Williams?

_____

_____

16. If so, then what punitive damages, if any, do you award?

$ _____

54

(2)

No. 06-1232

FILED
MAY 1 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

CSX TRANSPORTATION, INC.
and RONALD PAUL BOWEN,

Petitioners,

v.

EARTHA MAE WILLIAMS,
as Personal Representative of the Estate
of Gregory Stanley Williams,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

John E. Parker
Counsel of Record
J. Paul Detrick
Grahame E. Holmes
PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.
101 Mulberry Street East
Post Office Box 457
Hampton , South Carolina 29924
(803) 943-2111

Counsel for Respondent

THE LEX GROUP[DC] • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

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STATEMENT OF THE CASE

This case arises out of the collision of a truck driven by Gregory Williams and a ballast regulator, a piece of the Petitioner's railroad equipment, at Petitioner's railroad grade crossing on January 3, 2001, in Swansea, South Carolina. Mr. Williams was killed in the collision. On January 23, 2001, Respondent Eartha Mae Williams, Gregory Williams' mother, filed this wrongful death action against the Petitioner CSX Transportation, Inc. and Ronald Paul Bowen for the death of her son.

The Respondent alleged that Ronald Paul Bowen, the operator of the ballast regulator, was negligent and reckless in failing to yield the right-of-way, in failing to stop at the crossing, in failing to warn highway traffic of his approach, in proceeding over the crossing when the crossing was not clear, in failing to properly sound the horn, in operating the ballast regulator at an excessive rate of speed, in failing to keep a proper lookout, and in violating Petitioner's on-track operating rules. The Respondent alleged that Petitioner was vicariously liable for Mr. Bowen's actions. The Respondent further alleged Petitioner was liable for failing to maintain adequate warning devices at its crossing, failing to properly maintain the vegetation on its right-of-way to provide adequate sight distance for motorists using the crossing, and for allowing an unqualified and incompetent person to operate its ballast regulator. The Petitioner admitted that there was a collision and that Mr. Williams died as a result of the collision, but otherwise denied Respondent's allegations.

The trial of the case began on October 14, 2003, and concluded on October 30, 2003. Ronald Paul Bowen was dismissed as a defendant prior to the trial. The jury returned a verdict in favor of Respondent in the amount of 4.5 million dollars actual damages and 7.5 million dollars punitive damages.

The Petitioner filed post-trial motions seeking a judgment notwithstanding the verdict, new trial, and new trial *nisi* remittitur. The trial court held a post trial review of the punitive damages award pursuant to *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), *State Farm v. Campbell*, 538 U.S. 408 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The trial court entered an order reducing the punitive damages award by 3 million dollars. The trial court denied the other post-trial motions. (Petitioner's App., 13a-21a).

After the trial court ruled on the Petitioner's post trial motions, the Respondent filed a notice of appeal from the order reducing the punitive damages award. The Petitioner also filed a notice of appeal from the jury's verdict and the denial of its post-trial motions. The Supreme Court of South Carolina exercised jurisdiction over the appeal without a decision of the South Carolina Court of Appeals.

On appeal, the Petitioner alleged, among other things, that the trial court erred by not bifurcating the issues of liability and punitive damages for separate trials, by not using Petitioner's special verdict form, and by not charging the jury with the Petitioner's proposed jury charges on punitive damages. The Petitioner argued this error warranted "a new trial on punitive damages."

After hearing oral arguments, the Supreme Court of South Carolina issued an unpublished opinion on January 2, 2007. The Supreme Court of South Carolina affirmed the jury's award of actual damages and reversed the jury's award of punitive damages. The Supreme Court of South Carolina found the trial court erred in charging the jury on negligence *per se*, but that the erroneous charge did not constitute reversible error because the Petitioner failed to show that it was "injured and prejudiced" by the instruction as required under South Carolina law. (Petitioner's App., 7a) The Supreme Court of South Carolina found that the Petitioner had not been prejudiced by the negligence *per se* charge because there were a number of thoroughly developed theories of liability presented in the case. The Supreme Court of South Carolina reversed the jury's award of punitive damages because "the trial court's jury instructions... misstated the standard of proof for clear and convincing evidence" for an award of punitive damages as required under South Carolina Code Ann. § 15-33-135 (2005). (Petitioner's App., 9a). As the Petitioner requested, the Supreme Court of South Carolina remanded the case for a new trial on the issue of punitive damages.

The Petitioner filed a Motion for Rehearing and contended that a retrial on only punitive damages would violate Petitioner's due process rights, that the Supreme Court of South Carolina misapplied the "two issue rule," and that the court's decision allows the admission of evidence that "is constitutionally impermissible under [the Supreme Court of South Carolina's] decision in *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005)." The Petitioner's assertion in its Motion for Rehearing that a new trial limited to punitive damages would violate its rights of due process directly

contradicts its previous argument to the Supreme Court of South Carolina that "[i]f [Petitioner] is not entitled to judgment as a matter of law on punitive damages, the improperly admitted evidence ... [is] sufficiently prejudicial and unrelated to the cause of plaintiff's injuries to warrant a new trial on punitive damages." In seeking a new trial on punitive damages before the Supreme Court of South Carolina, the Petitioner cited *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153 (Ky. 2004) and *Wohlwend v. Edwards*, 796 N.E.2d 781, 786-87 (Ind. Ct. App. 2003). (Appellant's Final Brief on Behalf of Appellant/Respondent, p. 42). The courts in each of these cases remanded for a retrial limited to the issue of punitive damages.

The Supreme Court of South Carolina did not apply the "two issue rule" in upholding the jury's award of actual damages. The "two issue rule" was only even mentioned in the single dissent to the court's opinion. Further, the Supreme Court of South Carolina's decision was not inconsistent with its holding in *Webb v. CSX Transp., Inc., supra*. The Supreme Court of South Carolina denied Petitioner's Motion for Rehearing without specifying the reasons for the denial. (Petitioner's App., 22a-23a).

REASONS FOR DENYING THE WRIT

I. THE PETITIONER INVITED THE ERROR OF WHICH IT NOW COMPLAINS.

The Petitioner argues that a retrial of only punitive damages will violate its constitutional rights even though the Petitioner requested that the Supreme Court of South Carolina grant a new trial on the issue of punitive

damages as one of the potential avenues of relief. The Petitioner, in seeking a new trial on punitive damages, stated:

> "If [Petitioner] is not entitled to judgment as a matter of law on punitive damages, the improperly admitted evidence ... [is] sufficiently prejudicial and unrelated to the cause of plaintiff's injuries to warrant a new trial on punitive damages. Indeed because of the jury's probable consideration of these dissimilar matters in assessing punitive damages, the conclusion that a new trial is necessary is constitutionally compelled. *See* Sand Hill Energy, Inc. v. Smith, 142 S.W.3d 153 (Ky. 2004) (new trial required where evidence of out-of-state conduct admitted in contravention of State Farm and no instruction was given not to base punishment on that conduct.). *See also* Wohlwend v. Edwards, 796 N.E.2d 781, 786-87 (Ind. Ct. App. 2003) (error to admit evidence that does not satisfy State Farm's causation requirement).

(Appellant's Final Brief on Behalf of Appellant/ Respondent, p. 42). The courts in *Sand Hill* and *Wohlwend* both remanded cases for new trials limited to punitive damages. In its argument to the Supreme Court of South Carolina, the Petitioner distinguished between its request for a new trial on punitive damages and a new trial absolute when it argued that "not only is [Petitioner] entitled to a new trial on punitive damages ... it is also entitled to a new trial on liability because unreliable

expert opinions pervaded plaintiff's case." (Appellant's Final Brief on Behalf of Appellant/Respondent, p. 42).

A party cannot complain when it receives the relief it has requested from the court. *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228 (1952); *Bowman v. Bowman*, 357 S.C. 146, 591 S.E.2d 654 (S.C. App. 2004). The Petitioner asked the Supreme Court of South Carolina for a new trial on the issue of punitive damages and cited authority for its requested relief. Now that the Petitioner has been granted the relief it requested, it claims the relief it sought is unconstitutional. The Petitioner cannot now complain that a new trial on punitive damages is unconstitutional and the Petition should be denied. Further, the Petitioner should not be allowed to use this forum to collaterally attack the jury's actual damages award by now claiming a retrial of only punitive damages is unconstitutional.

II. THE PETITIONER HAS NOT BEEN INJURED AND DOES NOT HAVE ARTICLE III STANDING TO INVOKE THE COURT'S JURISDICTION.

The Petitioner argues "the Supreme Court of South Carolina has ruled in a manner that violates" the holdings of *Campbell* and *Philip Morris USA v. Williams*, 549 U.S. ___ (2007). The Supreme Court of South Carolina did not affirm the jury's award of punitive damages against Petitioner and its due process rights have not been violated. Rather, the jury's punitive damages award was reversed and remanded due to the trial judge's erroneous jury charge regarding the burden of proof to be applied by the jury when deciding whether to award punitive damages. The Petitioner has not

suffered any injury due to the Supreme Court of South Carolina's decision because there has not been an award of punitive damages against the Petitioner.

The Court may exercise jurisdiction over a case where the judgment of a state court causes "direct, specific, and concrete injury to the parties who petition for [the Court's] review, where the requisites of a case or controversy are also met." *Nike v. Kasky*, 539 U.S. 654 (2003) (citing *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989)). However, a party does not have Article III standing to invoke the jurisdiction of the Court where "no 'final judgment altering tangible legal rights' has been entered." *Id.* Further, the Court will not extend its jurisdiction "to cover an interlocutory ruling that merely allows a trial to proceed." *Id.*

While the Petitioner alleges it "is at grave risk that it will have its due process rights violated," the Supreme Court of South Carolina's decision is not a "final judgment altering tangible legal rights." Rather, the decision is an interlocutory ruling that allows a retrial of punitive damages. The Petitioner does not have Article III standing to invoke the jurisdiction of the Court and the Petition should be denied.

III. THERE HAS NOT BEEN A FINAL DECISION ON PUNITIVE DAMAGES AS REQUIRED FOR REVIEW BY THE COURT.

The Petitioner requests the Court to review an unpublished, interlocutory decision of the Supreme Court of South Carolina. 28 U.S.C.A. § 1257(a) provides "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be

reviewed by the Supreme Court by writ of certiorari ..." The state court's decision was not a final judgment as stated in 28 U.S.C.A. § 1257(a). Rather, the state court remanded the issue of punitive damages for retrial. While the Petitioner alleges any award of punitive damages will deprive it of due process, there has yet to be a determination as to whether any punitive damages will be awarded against Petitioner. Because the Petitioner has not suffered any harm and there has not been a final judgment on punitive damages, its Petition should be denied.

This case does not fall within any exceptions to the finality requirement for granting a writ of certiorari as set out in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Each of these exceptions apply to cases where a federal issue has been "finally decided" but there are further proceedings yet to occur. The Supreme Court of South Carolina has not "finally decided" any federal issue. A ruling on the federal issues raised by Petitioner was unnecessary because the Supreme Court of South Carolina found the trial judge erred in her charge on clear and convincing evidence. As these federal issues were unnecessary to the court's decision and were not addressed, the Petitioner is free to raise these issues to the trial court and, if it does not prevail on retrial, to the state appellate courts. Since there has been no decision on these federal issues, the outcome of Petitioner's challenge is not "preordained." If the Petitioner prevails, the federal issue will not "survive and require decision." Finally, a reversal of the state court on the federal issue would not be "preclusive of any further litigation" on the issue of punitive damages. The parties will still have to litigate punitive damages. Therefore, the Petition does not fall within any of the exceptions to the finality

requirement for the issuance of a writ of certiorari and the Petition should be denied.

Further, "[t]he Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." *Nike v. Kasky, supra.* There will not be a question of constitutional law for the Court to decide if punitive damages are not awarded on retrial. At the trial on punitive damages the Petitioner will be able to request all the jury charges and make all objections to evidence it made in the first trial. Therefore, there is not a necessity to decide any issue of constitutional law and the Court should not exercise jurisdiction over this case.

IV. THE PETITIONER HAS NOT PRESENTED QUESTIONS OF SUFFICIENT GENERAL IMPORTANCE FOR REVIEW BY THE COURT.

The Court has long held:

> It is very important that we be consistent in not granting the writ of certiorari except in cases involving the principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923). "Even though the resolution of a constitutional question would be of great practical importance to the litigants, that is ordinarily not a sufficient reason for granting certiorari, where the question is not of sufficient

general importance." 36 C.J.S. Federal Courts § 296; *See also, Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994).

Granting the Writ of Certiorari would not resolve any question of importance to anyone other than the parties to this litigation. The state court's opinion specifically states "THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2) SCACR."[1] As such, the Supreme Court of South Carolina's decision has no precedential value and will not control the outcome of any other cases. Therefore, the resolution of the constitutional question would only be of importance to the parties to this case, if it is in fact even important to them, and is not of sufficient general importance to warrant a decision of the Court.

V. THE WRIT FOR CERTIORARI IS NOT CONSISTENT WITH SUPREME COURT RULE 10.

Contrary to the Petitioner's contention, the Supreme Court of South Carolina did not "decide an important question of federal law that has not been, but should be, settled by this Court" or decide "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The Supreme Court of South Carolina reversed the award of punitive damages because "the trial court's jury instructions in this case misstated the standard of proof for clear and

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[1] "Unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." SCACR 239(d)(2).

convincing evidence" as required under South Carolina Code Ann. § 15-33-135 (2005). The Supreme Court of South Carolina did not decide the federal questions presented in the Petition for Writ of Certiorari because Petitioner raised those issues for the first time in its Petition for Rehearing to that court. The Supreme Court of South Carolina denied the petition without a decision on any of the issues presently being raised. Therefore, granting a writ is not warranted under Supreme Court Rule 10(c).

The Court may grant a writ of certiorari where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals". Sup. Ct. R. 10(b). There is not a split of authority on any important federal question decided by the Supreme Court of South Carolina in this case. In fact, the United States courts of appeals have frequently remanded actions to trial courts for retrials limited to the issue of punitive damages.[2] Since there is not a conflict in decisions on a federal question that needs to be decided by the Court, this case does not fall under Supreme Court Rule 10(b).

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[2] *See, Che v. Massachusetts Bay Transp. Authority*, 342 F.3d 31 (1st Cir. 2003); *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163 (2nd Cir. 2000); *Alexander v. Riga*, 208 F.3d 419 (3rd 2000); *Defender Industries, Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991); *Black v. Fidelity & Guaranty Ins. Underwriters, Inc.*, 582 F.2d 984 (5th 1978); *Whits v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789 (6th Cir. 2004); *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503 (7th Cir. 1997); *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061 (8th Cir. 1988); *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002); *E.E.O.C. v. Heartway Corp.*, 466 F.3d 1156 (10th Cir. 2006); and *Straw v. Chase Revel, Inc.*, 813 F.2d 356 (11th Cir. 1987).

"A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Much of the Petitioner's argument stems from its inaccurate statement that Petitioner's dissimilar acts, separate from the acts on which liability was premised, served as the basis for the jury's award of punitive damages. In following *Campbell,* supra., the trial court properly considered the evidence to determine if the evidence was of conduct "substantially similar" to the conduct of the Petitioner which gave rise to the subject lawsuit. (Tr. P. 2027, lines 20-24). The trial judge made fact specific findings that the evidence Respondent introduced was not dissimilar or unrelated to the conduct which resulted in harm to Mr. Williams. The trial judge also specifically charged the jury that the evidence was introduced for the limited purpose of establishing notice and should be viewed only in that regard. (Tr. 1487, line 25- p. 1488, line 8; r. p. 1494, lines 10-24; Tr. p. 2084, line 14- p. 2085, line 8; Tr. p. 2036, lines 7-17; Tr. p. 3530, lines 1-21). Any error asserted by the Petitioner on this issue could only be an erroneous factual finding or the misapplication of *Campbell,* a properly stated rule of law. Therefore, the Petition for Writ of Certiorari is not consistent with Supreme Court Rule 10 and should be denied.

VI. THE TRIAL COURT DID NOT ADMIT EVIDENCE IN VIOLATION OF *CAMPBELL* OR *PHILIP MORRIS.*

The Petitioner incorrectly argues that the trial court improperly admitted evidence of dissimilar, unrelated conduct that served as a basis for the jury's award of punitive damages in violation of *Campbell,*

supra. "A defendant's dissimilar acts, independent from acts on which liability was premised, may not serve as a basis for punitive damages." *Id.* at 422. "The Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties..." *Philip Morris, supra.*

The trial court did not admit evidence of dissimilar, unrelated conduct. Petitioner owns, maintains and operates a continuous railroad track through twenty three states, including South Carolina. At trial, the Respondent presented a portion of the Federal Railroad Administration's Safety Assurance and Compliance Program Report from a safety assurance and compliance audit performed by the FRA in February of 1998. The report discusses Petitioner's ongoing problem with excessive vegetation on its rights-of-way. (Tr. P. 2031, line 17- p. 2032, line 10). The FRA audit discusses Petitioner's vegetation control problems across Petitioner's "system on several operating divisions" and concludes that Petitioner did not have a sufficient vegetation control program in place to properly address its problems with excessive vegetation. (Tr. P. 2032, Line 23-2 p.2033, line 2). The Respondent also presented evidence that Petitioner received this report and acknowledged that it lacked a proper vegetation control program. The Petitioner's failure to properly maintain vegetation on its right-of-way resulted in Mr. Williams' death.

The trial court admitted a report of DeAngelo Brothers, a contracting company, which identified several problems Petitioner was experiencing with vegetation control at its railroad grade crossings and the sight obstructions to motorists caused by the vegetation. The

trial court likewise admitted a letter from Union Pacific Railroad to Petitioner wherein Union Pacific discussed the problems it incurred with controlling vegetation at railroad crossings and how the vegetation obstructed motorists' sight distance and caused collisions. Union Pacific described the vegetation control program it had implemented and the effectiveness of the program. Even though it had notice of the need for a program to effectively control vegetation on its crossings which obstructed the sight distance of motorists, the Petitioner failed to take measures to effectively control the vegetation at its crossings. Evidence was also admitted of fines imposed by the South Carolina Department of Transportation for Petitioner's failure to control excessive vegetation which created sight distance obstructions at its railroad crossings throughout South Carolina. The trial court also allowed testimony regarding two collisions at two of Petitioner's other railroad crossings in South Carolina which occurred prior to the subject collision. The trial court found that both of these collisions were substantially similar because of the existence of sight distance obstructions due to excessive vegetation on Petitioner's right-of-way.

None of this evidence involves dissimilar, unrelated acts. The evidence all stems from one issue, failure to maintain sight obstructing vegetation. The Respondent alleged, and proved, Mr. Williams was not able to see the ballast regulator which struck his vehicle because of the excessive vegetation at the subject crossing. Petitioner's failure to control its vegetation, among other acts of negligence, caused Petitioner's death. Because all of the contested evidence related directly to sight distance obstructing vegetation and Petitioner's failure to control vegetation, it is not dissimilar.

The admission of this evidence is consistent with *Campbell*. "Evidence of other acts need not be identical to have relevance in the calculation of punitive damages..." *Campbell* at 423. In *Campbell*, the Court held "because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis." *Id.* at 424. Unlike *Campbell*, here the Respondent introduced evidence that the Petitioner's system wide practice of ignoring appropriate vegetation control caused Mr. Williams' death. The Respondent showed evidence of similar crossings in South Carolina with obstructed sight distance and two similar collisions in South Carolina which were caused by obstructed sight distance. The evidence of Petitioner's conduct on those occasions is extremely similar, if not identical, to the conduct that harmed Mr. Williams. Therefore, the evidence is relevant to the reprehensibility analysis.

Further, "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *Campbell* at 422. The FRA report and the DeAngelo Brothers proposal both cite Petitioner's ongoing problems with excessive vegetation and Petitioner's need to adopt a vegetation control plan. While these documents include problems with vegetation in other states, they both include Petitioner's rights-of-way in South Carolina and the crossing in question. This evidence shows that vegetation control was considered by Petitioner as a system wide program. This system wide problem included South Carolina.

In admitting the FRA report, the trial court properly applied *Campbell*. The trial judge found that the FRA report contained evidence of vegetation control in other states, but that it included South Carolina. The trial court found it was relevant to the issue of Petitioner's notice of its need for a vegetation control program, and admitted the report for this limited purpose. Petitioner's failure to implement a proper vegetation program has a nexus to the harm caused to Mr. Williams as Mr. Williams was killed because his sight distance was obstructed due to excessive vegetation. The Petitioner's failure to implement a vegetation control program, when it had knowledge of excessive vegetation on its rights-of-way and at the crossing in question, demonstrates the deliberateness and culpability of Petitioner's conduct and was properly admitted.

VII. THE SUPREME COURT OF SOUTH CAROLINA'S DECISION AND THE UNDERLYING TRIAL PROVIDED ADEQUATE PROCEDURAL SAFEGUARDS WHICH ARE CONSISTENT WITH *PHILIP MORRIS*.

The Petitioner argues that the trial court admitted "dissimilar evidence relating only to third parties, without any procedural safeguards," thereby creating "a 'perfect storm' of due process violations under *Philip Morris*." (Petitioner's Brief, p. 12). Petitioner frames its question as an issue of whether South Carolina failed to "guard against jury confusion concerning the due process limitations on punitive damages" under *Philip Morris*. As stated above, the trial court specifically found that the evidence of which the Petitioner complains was *not* "dissimilar" or unrelated to the harm in this case.

Therefore, the threat of jury confusion addressed in *Philip Morris* was not present in this case.

The trial court admitted the DeAngelo Brothers proposal in evidence with the following limiting instruction:

> [I]t is admitted solely for the purpose of showing that [Petitioner] had notice, had notice of the alleged need to have a vegetation control plan and for no other purpose. This evidence is to be considered by you on that issue. However, on that issue only. And it is not proof of any matter, other than that of notice.

(Tr. 1487, 1488). The other evidence Petitioner claims was dissimilar was admitted subject to the same limiting jury instruction. (Tr. P. 1494, lines 10-24; Tr. P. 2084, line 14-p. 2085, line 8; 2036, lines 7-17). The trial judge properly instructed the jury that the above described evidence was admitted solely to prove the Petitioner had notice of the "alleged need" of a vegetation control plan and that the evidence was not to be considered for any other purpose. Juries are presumed and bound to follow the law as instructed to them by the trial judge. *State v. Grovenstein*, 517 S.E.2d 216 (S.C. 1999).

"Although the states have some flexibility to determine the *kind* of procedure they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Philip Morris* at 1065. The contested evidence was admissible on the issue of notice and the Petitioner's due process rights were protected by the trial judge's limiting instructions. The

evidentiary findings of the trial court and its limiting instructions, coupled with the Supreme Court of South Carolina's conscientious findings on appeal, illustrate the presence of adequate procedural safeguards which comport with the Court's decision in *Philip Morris*.

Furthermore, while the Petitioner complained of issues concerning the admissibility of evidence to the Supreme Court of South Carolina, the evidentiary issues were not raised as issues on appeal as required by the South Carolina Appellate Court Rules. SCACR, 208. Because the Petitioner failed to include the trial court's rulings on the contested evidence as an issue on appeal, there is no ruling by the Supreme Court of South Carolina on the substance of any evidentiary issue which Petitioner now complains will deprive it of due process on retrial. The Petitioner relies on the blanket conclusion that "dissimilar" evidence was admitted and will be presented at retrial, despite the fact that these conclusions were never properly raised and ruled upon in the Supreme Court of South Carolina. Essentially, the Petitioner seeks to create a constitutional issue on issues which were never properly raised or addressed by the Supreme Court of South Carolina.

Notwithstanding the above, even if the requisite procedural safeguards were not provided below, on retrial the trial court is bound to apply the analysis of *Philip Morris* as well as all of the Court's holdings in its long line of punitive damages cases. The Petitioner's request for the Court to review this case is premature because under the decision of the Supreme Court of South Carolina, the new trial must meet all constitutional requirements.

VIII. THE SUPREME COURT OF SOUTH CAROLINA'S DECISION TO ORDER A RETRIAL LIMITED TO THE ISSUE OF PUNITIVE DAMAGES IS CONSISTENT WITH THE CONSTITUTIONAL REQUIREMENTS OF *CAMPBELL* AND *PHILIP MORRIS*.

The Petitioner argues that the trial court's use of a general verdict form and the Supreme Court of South Carolina's affirmation of the jury's award of actual damages precludes the Petitioner from determining which conduct it will have to defend against at the retrial on punitive damages and therefore Petitioner will be deprived of its rights of due process. This argument is without merit.

Contrary to the Petitioner's assertions, the Petitioner's due process rights under *Campbell* and *Philip Morris* were protected during the state court trial and on appeal. As addressed above, the trial court made specific findings that the contested evidence was admissible considering *Campbell*'s "dissimilar conduct" analysis. These rulings were properly upheld by the Supreme Court of South Carolina. Proper evidentiary and procedural safeguards were employed, and the trial court properly instructed the jury this evidence was only to be considered on the issue of notice. Notice may properly be considered in the reprehensibility analysis for punitive damages. *Gore*, supra. Finally, at the post-trial stage, the trial court applied the Court's precedent and conducted a *de novo* review of the punitive damages award, and reduced the award of punitive damages to a one-to-one ratio which is well within the parameters of the Court's constitutional limitations on punitive damage awards.

Even though the constitutional safeguards of *Campbell* and *Philip Morris* have been applied in the state court, Petitioner now attempts to create a constitutional issue of the trial court's use of a general verdict form. During the trial Petitioner proposed a special verdict form which required the jury to answer, including subparts, thirty-one (31) specific questions. (Petitioner's App., 31a-36a). The trial court, in its discretion, declined to submit this special verdict form to the jury. Petitioner claims that because of the use of a general verdict form in the first trial, the jury in the second trial may punish the Petitioner on a theory of liability different from the theory of liability on which the jury awarded actual damages. The Petitioner misstates the constitutional safeguards which are required. The constitutional requirement is that the jury may only punish the Petitioner for the conduct which it determines killed Mr. Williams. On retrial, the jury will be so instructed, and the Petitioner's constitutional due process rights will be protected.

The retrial of punitive damages will include the presentation of all theories of liability previously presented, and the same evidence which Petitioner objected to in the first trial will be offered and the trial court will have to rule on the admissibility of the evidence. The trial court is bound to ensure that all procedural safeguards required by the Court are employed. The *Campbell* analysis will be applied by the trial court to all evidence which is offered in evidence, and the safeguards required by *Philip Morris* to guard against jury confusion will be instituted. Petitioner will have the opportunity to again challenge the admissibility of evidence it now contends is inadmissible. At the close of the case, the jury will be charged on the applicable law

and will decide whether the conduct of Petitioner warrants an award of punitive damages. Even if there were deficiencies in the previous trial with regard to punitive damages or in the appellate court, these deficiencies are of no consequence because the Petitioner will receive a new trial on punitive damages.

The Petitioner seeks to have the Court dramatically expand the concept of substantive due process to require state courts to use a special verdict form in all cases seeking punitive damages which involve more than one theory of liability. The verdict form used by state trial courts would become a federally mandated due process issue.[3] While the Court has explicitly set forth procedural and substantive requirements in the field of punitive damages, it has never sought to impose specific trial procedures, but it has left these types of decisions to the state courts. *Philip Morris* at 1065. Accordingly, the Petition for Certiorari should be denied.

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[3] The decision of whether to submit a general or special verdict form to the jury has long been held as a discretionary power of the trial judge in South Carolina. *See, Love v. Oswald*, 272 S.C. 347, 251 S.E.2d 766 (1979) (Establishing that this is an issue of discretion).

IX. THE SUPREME COURT OF SOUTH CAROLINA DID NOT APPLY THE TWO ISSUE RULE IN AFFIRMING THE TRIAL COURT; AND, EVEN IF THE TWO ISSUE RULE WERE APPLIED, THE APPLICATION OF THE RULE DOES NOT PREVENT A *DE NOVO* REVIEW OF A PUNITIVE DAMAGES AWARD ON APPEAL.

Petitioner petitioned the Supreme Court of South Carolina for rehearing contending that it "incorrectly applied the two issue rule in a fashion never before recognized... and in a manner that creates a disincentive for trial courts to ever grant a party's request for a special verdict form." Petitioner further argued vaguely and without supporting authorities, that the application of the two issue rule "unconstitutionally prevents the *de novo* review of punitive damages awards."

The Supreme Court of South Carolina did not apply the "two issue" rule in affirming the award of actual damages. Petitioner bases its argument on the Supreme Court of South Carolina's recognition that there were "several other, more thoroughly developed theories of liability" and that an erroneous jury charge did not warrant reversal of the actual damages award. This sentence in the Supreme Court of South Carolina's opinion did not reflect application of the "two issue" rule. The Supreme Court of South Carolina found the erroneous instruction did not harm petitioner and it was not prejudiced by the erroneous charge on negligence *per se*. Under South Carolina law, the issue of whether an erroneous jury instruction rises to the level of reversible error is determined by whether the appellant has shown sufficient prejudice. "[T]he giving of an erroneous

instruction is not reversible error, unless the appellant can show that he was injured or prejudiced thereby." *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961). The Supreme Court of South Carolina, in noting the other theories of liability which were more fully developed against Petitioner, merely illustrated the lack of prejudice occasioned by the erroneous charge given to the jury.[4]

Even if the Supreme Court of South Carolina used the "two issue" rule in order to uphold the lower court, such application does not rise to a constitutional due process issue that should be decided by the Court. "Under the 'two issue' rule, when the jury returns a general verdict involving two or more issues and its verdict is supported by at least one issue, the verdict will not be reversed on appeal." *Todd v. South Carolina Farm Bureau Mutual Ins. Co.*, 287 S.C. 190, 193, 336 S.E.2d 472, 473-74 (1985); *Anderson v. South Carolina Department of Highways and Public Transportation*, 322 S.C. 417, 472 S.E.2d 253 (1996). The "two issue" rule is utilized by the appellate courts of South Carolina as "a procedural tool for upholding" decisions and upon application of the rule, South Carolina courts will "find it unnecessary to address all the grounds appealed where one requires affirmance." *Id.* at 255.

The Petitioner argues without explanation, that a "*de novo* review [of punitive damages] cannot be properly conducted when the two issue rule, combined with a

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[4] The lack of prejudice or injury caused by the erroneous jury instruction is further illustrated by the fact that even without the negligence *per se* charge based upon 49 C.F.R. § 214.355, South Carolina common law principles impose upon Petitioner the duty to properly supervise and train its employees.

refusal to grant a request for a special verdict form, prevents the appellate court from ascertaining the underlying basis for punitive damages." This bald assertion is completely unsupported by citation to authority and is so conclusory that the Court should not consider this contention.[5] Moreover, even if the argument is properly before the Court and has not been waived or abandoned, it strains logic to conclude that a retrial on punitive damages would not include proper procedural safeguards. As discussed above, all evidentiary issues will be reheard and the jury will be instructed by the trial judge consistent with the Court's decisions regarding punitive damages. If punitive damages are awarded, the trial court and appellate courts will then review the amount of the award in accordance with *Campbell, supra,* and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

Further, the Supreme Court of South Carolina's decision to affirm the award of actual damages is the only final decision of the South Carolina Supreme Court. As stated above, the Supreme Court of South Carolina found the erroneous charge on negligence *per se* did not prejudice the Petitioner because of the other well developed theories of negligence submitted to the jury. These other theories of negligence, as well as the finding that Petitioner was not prejudiced by the erroneous charge, all involved state law and provided separate, adequate and independent state grounds for the Supreme Court of South Carolina's decision.

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5 *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); *Cole v. South Carolina Electric & Gas, Inc.*, 355 S.C. 183, 584 S.E.2d 405 (2003); *Glasscock, Inc. v. United State Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) (stating short, conclusory arguments unsupported by authority are deemed abandoned).

The Supreme Court of South Carolina did not make any determination of issues of federal law requiring review by the Court under 28 U.S.C.A. § 1257(a). Therefore, as the only final judgment of the Supreme Court of South Carolina is based on adequate and independent state grounds, the Petitioner's Writ of Certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

John E. Parker
Counsel of Record
J. Paul Detrick
Grahame E. Holmes
Peters, Murdaugh, Parker,
Eltzroth & Detrick, P.A.
101 Mulberry Street East
P.O. Box 457
Hampton, SC 29924
(803) 943 2111 (telephone)
(803) 943 3943 (facsimile)

Counsel for Respondent

May 1, 2007

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No. 06-1232

FILED
MAY 14 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

CSX TRANSPORTATION, INC. and RONALD PAUL BOWEN,

Petitioners,

v.

EARTHA MAE WILLIAMS, as Personal Representative of the Estate of Gregory Stanley Williams,

Respondent.

On Petition for Writ of Certiorari from the Supreme Court of South Carolina

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

E. Duncan Getchell, Jr.
Counsel of Record
Robert L. Hodges
J. Tracy Walker, IV
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-4319 (telephone)
(804) 698-2061 (facsimile)

Phillip E. Reeves
Ronald K. Wray, II
GALLIVAN, WHITE & BOYD
55 Beattie Place
Suite 1200
Post Office Box 10589
Greenville, SC 29603
(864) 271-5362 (telephone)
(864) 271-7502 (facsimile)

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner CSX Transportation, Inc. ("CSXT") hereby submits the following reply addressing new matters raised by Respondent's opposition to CSXT's Petition for Writ of Certiorari. Each and every point urged in opposition to the granting of a writ misapprehends the law, the record, or both.

Respondent advances nine reasons why the writ of certiorari should not be granted, none of which directly address the overarching issue presented. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) ("*State Farm*"), this Court held that a jury may not base an award of punitive damages on dissimilar acts of a defendant without running afoul of the due process clause of the Fourteenth Amendment. Under this Court's recent decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) ("*Philip Morris*"), evidence considered for purposes of deciding punitive damages must be limited to evidence of conduct which caused the injury to the plaintiff. Evidence as to non-causative conduct or alleged harm to non-parties is not properly considered and an award that punishes a defendant for harm to non-parties is a deprivation of due process.

To that end, *Philip Morris* requires that states adopt and employ procedures to guard against jury confusion with regard to due process limitations on punitive damages. That was not done by the trial court, that was not done by the Supreme Court of South Carolina, and that cannot be done by a jury on remand under the mandate issued by the Supreme Court of South Carolina.

The trial court, among other errors not relevant here, refused CSXT's requests for procedural safeguards against due process violations when it: 1) denied CSXT's request for bifurcation of punitive damages; 2) admitted evidence of

out-of-state conduct and evidence of dissimilar accidents, crossings, and vegetation control programs; 3) failed to give CSXT's requested jury instructions that dissimilar acts may not serve as the basis for punitive damages and that conduct outside the state of South Carolina may not be considered, and; 4) refused CSXT's proposed special verdict form. (Petitioner's App. at 31a – 36a.)

On appeal, the Supreme Court of South Carolina perpetuated the trial court's deprivation of CSXT's due process rights when it affirmed liability, and then, without the benefit of a special verdict form, remanded for a trial solely on punitive damages. The Supreme Court of South Carolina's decision was based upon application of that state's "two issue rule," the principles of which are incompatible with the constitutional requirements applicable to punitive damage awards, making it impossible to provide the procedural safeguards required by *State Farm* and *Philip Morris* on remand.

I. CSXT DID NOT INVITE A RETRIAL LIMITED TO PUNITIVE DAMAGES WITHOUT THE PROCEDURAL SAFEGUARDS REQUIRED BY *STATE FARM* and *PHILIP MORRIS*. (Reply to Argument I.)

First, Respondent asserts that CSXT invited the Supreme Court of South Carolina to remand as to punitive damages alone, thereby guaranteeing a continuing violation of CSXT's due process rights. This contention is without merit.

As a threshold matter, CSXT made its position perfectly clear with regard to the lack of procedural safeguards, objecting to the refusal to bifurcate the proceedings, the admission of non-causal and other improper

evidence, the refusal to give the proper jury instructions on punitive damages, and the refusal to use CSXT's special verdict form and then seeking rehearing on the decision to remand solely as to punitive damages. As recited in detail in CSXT's Petition, the record is replete with CSXT's protestations that the failure to employ these procedural safeguards was in violation of CSXT's due process rights. (See CSXT's Petition for Writ of Certiorari at 3 – 10.) It cannot be said that CSXT requested the so-called "relief" it received from the Supreme Court of South Carolina in the form of a continued lack of requisite safeguards on remand.

II. WITH REGARD TO PUNITIVE DAMAGES, CSXT WAS TRIED IN AN UNCONSTITUTIONAL MANNER AND WILL BE RETRIED WITH A PROCEDURE THAT DOES NOT SATISFY *PHILIP MORRIS.* (Reply to Argument II.)

Respondent next argues that because the Supreme Court of South Carolina did not affirm the jury's award of punitive damages, CSXT has suffered no injury and lacks standing. This argument misapprehends the error assigned.

The multiple theories of liability asserted by Respondent in this case included negligence *per se*, negligent vegetation maintenance, operator incompetence, excessive speed, and operator's failure to sound the horn. Although CSXT maintains that permitting the jury to consider punitive damages was erroneous, the error assigned in this Petition is that the requisite procedural safeguards were wholly absent at the first trial, and that that situation was perpetuated by the Supreme Court of South Carolina. On remand there will be no available method to ensure that any award of punitive damages is based only upon causal evidence -- a state of affairs flatly prohibited in *Philip Morris*. The "injury" is not

the punitive damage award itself. Rather, CSXT is subject to retrial on punitive damages in a facially unconstitutional manner; an issue properly preserved below and ripe for adjudication by this Court.

CSXT need not wait to be assessed punitive damages on remand to have standing. The lack of procedures mandated by the Supreme Court of South Carolina in violation of CSXT's right to due process is a concrete injury to CSXT. "It is axiomatic that one has standing to litigate his or her own due process rights," *Campbell v. La.*, 523 U.S. 392, 400 (1998), and Respondent's argument to the contrary misses the mark.

III. REVIEW OF SOUTH CAROLINA'S FAILURE TO EMPLOY THE REQUISITE PROCEDURAL SAFEGUARDS IS AVAILABLE PRIOR TO ANY ACTUAL AWARD OF PUNITIVE DAMAGES ON REMAND. (Reply to Argument III.)

Similarly, Respondent asserts that the Supreme Court of South Carolina's decision is not reviewable because it is not a "final judgment" until punitive damages are awarded on remand. As discussed above, the error for which CSXT seeks redress is not the actual award of punitive damages itself. The Supreme Court of South Carolina rendered a final decision that mandates CSXT be tried on punitive damages in an unconstitutional way in contravention of *State Farm* and *Philip Morris*. That is the injury.

CSXT is not asking this court to "anticipate a question of constitutional law." (Resp. Br. at 9.) The Supreme Court of South Carolina created the federal issue presented in CSXT's Petition by remanding for a new trial solely on punitive damages without any way to limit the

jury's consideration of non-causative evidence, thereby perpetuating the trial court's denial of CSXT's due process rights. There is nothing forward looking or prospective about the question presented here.

IV. CSXT HAS PRESENTED AN ISSUE OF GENERAL IMPORTANCE AND ALSO AMPLE JUSTIFICATION FOR A GVR ORDER IN LIGHT OF *PHILIP MORRIS.* (Reply to Argument IV.)

Respondent alleges that because the Supreme Court of South Carolina's order is unpublished, CSXT's Petition does not present a question of "significant general importance." (Resp. Br. at 10.) However, CSXT has presented both an issue of general importance warranting the grant of *certiorari* and a case prime for this Court to grant a GVR Order in light of *Philip Morris.*

First, the question presented is whether, in the punitive damages context, application of South Carolina's "two issue rule," in a case containing multiple liability theories, without a special verdict form, can satisfy constitutional standards set forth in *State Farm* and *Philip Morris.* Although the "two issue rule" was upheld in this Court four generations ago in another context, *see Bond v. Dustin*, 112 U.S. 604, 609 (1884) ("whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration shall be sufficient to sustain the verdict"), it clearly violates *Philip Morris* in this context. It is a matter of general importance when a state has an unconstitutional punitive damages regime.

Furthermore, "[t]his case fits within the category of cases in which [this Court has] held it is proper to issue a GVR order." *Lawrence v. Chater*, 516 U.S. 163, 180 (1996) (*per curiam*). This Court regularly issues a GVR order where, as here, "an intervening event (ordinarily a post judgment decision of this Court) has cast doubt on the judgment rendered by a lower federal court or a state court concerning a federal question." *Id.* (citations omitted). *See also, e.g., Grier v. United States*, 419 U.S. 989 (1974) (issuing GVR order vacating and remanding in light of this Court's intervening decision in *Dorszynski* v. *United States*, 418 U.S. 424 (1974)). Respondent's brief fails to address CSXT's request for a GVR order at all.

Philip Morris was decided on February 20, 2007, less than three weeks after the Supreme Court of South Carolina denied CSXT's petition for rehearing on January 31, 2007. Despite Respondent's protestations to the contrary, *Philip Morris* unequivocally holds that state courts cannot do what South Carolina has done here, namely, "authorize procedures that create an unreasonable and unnecessary risk" of jury confusion with regard to punitive damages. *Id.* On retrial, it is impossible to guard against this risk. For these reasons, this Court should issue a GVR order, and vacate and remand the decision of the Supreme Court of South Carolina in light of *Philip Morris*.

V. THE SUPREME COURT OF SOUTH CAROLINA'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT. (Reply to Argument V.)

Despite Respondent's protestations to the contrary, the decision by the Supreme Court of South Carolina mandating that CSXT be retried in this unconstitutional manner "decided an important federal question in a way that

conflicts with relevant decisions of this Court," thus the standard for granting *certiorari* pursuant to Sup. Court R. 10 (c) is met.

VI. THE RECORD CLEARLY DEMONSTRATES THAT THE TRIAL COURT ADMITTED EVIDENCE IN VIOLATION OF BOTH *STATE FARM* AND *PHILIP MORRIS.* (Reply to Argument VI.)

Respondent's contention that the trial court did not admit evidence in violation of *State Farm* and *Philip Morris* is simply contrary to the record. The jury was allowed to consider impermissible evidence of dissimilar and out-of-state conduct, evidence which was in some instances the identical evidence that was held to constitutionally mandate reversal under *State Farm* in *Webb v. CSX Transport., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005).

VII. SOUTH CAROLINA FAILED TO PROVIDE PROCEDURAL SAFEGUARDS REQUIRED BY THIS COURT'S JURISPRUDENCE. (Reply to Argument VII.)

Respondent illogically argues that because some (but not all) of the evidence of dissimilar, non-causal and out-of-state conduct was admitted with a limiting instruction, the trial court provided adequate due process safeguards. (Resp. Br. at 17.) First, only a portion of the evidence in question was subject to the limiting instruction that it was admitted solely to prove CSXT had notice of the "alleged need" of a vegetation control program. Second, this limiting instruction, which is the sole procedural safeguard identified by Respondent, cannot be deemed adequate to preserve CSXT's due process rights. The record at trial demonstrates a complete lack of procedural safeguards. Additionally, the

limiting instruction only addressed vegetation evidence, and not much of the evidence of the multiple other liability theories. Respondent's assertion that under these circumstances, the risk of due process violations can be cured by a simple notice instruction is unsupported and unsupportable.

VIII. IN THIS CONTEXT, CSXT CANNOT BE RETRIED ON PUNITIVE DAMAGES ALONE WITHIN THE PARAMETERS OF *STATE FARM* AND *PHILIP MORRIS.* (Reply to Argument VIII.)

Respondent argues that CSXT's due process rights will be protected on remand because on retrial the jury will be instructed that it "may only punish [CSXT] for the conduct which it determines killed Mr. Williams." (Resp. Br. at 20.) However, that result can only be reached through a new trial on both liability and punitive damages, which is the relief CSXT seeks. *See, e.g., Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (remanding for a new trial, holding the issue of damages "is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial"). The order of the Supreme Court of South Carolina does not permit the second jury on remand to determine which conduct caused the injury, nor could it without retrying the liability issues.

This is not a situation where CSXT is seeking to transform the use of a special verdict form, traditionally a matter of discretion for the trial court, into a "federally mandated due process issue." (Resp. Br. at 21.) Rather, CSXT submits that under the circumstances of this case, where multiple theories of liability were presented and there

is no way to know upon which theory the first jury found liability, a retrial on punitive damages alone cannot be had within the parameters set forth by this Court in *State Farm* and *Philip Morris*. Indeed, the first jury may well have based its verdict on the negligence *per se* charge the Supreme Court of South Carolina found to be error. By its decision, the Supreme Court of South Carolina thus improperly invites the second jury to impose punitive damages based on non-causative conduct.

IX. THE SOUTH CAROLINA SUPREME COURT CLEARLY APPLIED THE TWO ISSUE RULE. (Reply to Argument IX.)

Under South Carolina common law, "where a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed." *Anderson v. West*, 270 S.C. 184, 188, 241 S.E.2d 551, 553 (1978). The Supreme Court of South Carolina, on the face of its opinion, applied this so-called "two issue rule" when it upheld the jury's finding of liability, despite finding error with regard to the Respondent's negligence *per se* theory, "given the several other, more thoroughly developed theories of liability in the case . . ." as Justice Pleicones aptly noted in his dissent. (Petitioner's App. at 7a.)

Furthermore, Respondent tacitly admits elsewhere in her brief that "two issue rule" principles were applied. Respondent supposes that the jury found "excessive vegetation" caused the injury, but then in the same breath acknowledges liability might have been founded upon one of the "other acts of negligence." (Resp. Br. at 14.) Of course the Respondent cannot say for certain.

CONCLUSION

South Carolina's common law "two issue rule" that favors judicial efficiency over procedural due process cannot be constitutionally upheld in the punitive damages context. Punitive damages must be based on harm to the plaintiff, and not on harm to others or on account of dissimilar conduct or conduct in other states.

Therefore, your petitioner prays that the Court will grant its writ of certiorari and take jurisdiction of this case. In the alternative, your petitioner prays that the Court will summarily grant the writ, vacate the decision below, and remand for further review in light of this Court's decision in *Philip Morris*.

Respectfully Submitted,

E. Duncan Getchell, Jr.,
*Counsel of Record**
Robert L. Hodges
J. Tracy Walker, IV
McGUIRE WOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-4319 (telephone)
(804) 698-2061 (facsimile)

Phillip E. Reeves
Ronald K. Wray, II
GALLIVAN, WHITE
& BOYD
55 Beattie Place
Suite 1200
Post Office Box 10589
Greenville, S.C. 29603
(864) 271-5362 (telephone)
(864) 271-7502 (facsimile)

COUNSEL FOR PETITIONERS
CSX TRANSPORTATION, INC.